UNITED STATES DEPARTMENT OF AGRICULTURE
Bureau of Agricultural Economics
Washington, D.C.

SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE of complaints filed under THE PERISHABLE AGRICULTURAL COMMODITIES ACT

No. 7 - NOT TO BE PUBLISHED - May 1, 1939

I N D E X

PACA SUMMARIES OF DECISIONS NOT TO BE PUBLISHED

S-1459, January 14, 1937, Docket 2210: (Hearing)

J. C. PALUMBO FRUIT CO., PAYETTE, IDAHO v. THE RUBIN CO., CHICAGO, ILLINOIS.

Violation charged: Unjustified rejection of two carloads of prunes.
Principal points involved: Severability of contract; rejection of two cars conforming to contract specifications was without reasonable cause.
Order: Complainant awarded $1100.57 with interest; publication of facts.
Appeal: Appeal dismissed and Secretary's order vacated by court order of November 2, 1938.

Outline of Facts

On or about August 29, 1935, through a broker, complainant sold to respondent 3 carloads of U.S. No. 1 Idaho prunes at the f.o.b. price of 75¢ per half bushel container and respondent advanced $100 per carload, or $300, to insure getting them. Thereafter complainant shipped a carload of prunes from loading point in the State of Idaho to respondent at Chicago, Illinois but on respondent's objection complainant did not insist on acceptance and no claim was made by complainant for the loss sustained on the resale of this shipment. On or about September 12 and September 13, complainant shipped two more carloads from the State of Idaho to Chicago, each containing 1056 half bushel baskets, and complainant drew a draft on respondent for each shipment for the contract price less the $100 advanced, or in the net sum of $692. Respondent rejected both shipments and one was resold for a net sum of $139.72, or at a loss of $552.28, and the other for a net sum of $43.71, or at a loss of $648.29, making a total loss of $1200.57, less the $100 advanced on the first car mentioned above, or $1100.57.

Respondent alleged the rejections were made because the prunes did not conform to warranty of good sized prunes and contended that this was a single transaction for 3 carlots and, since the complainant admitted that the first shipment was not up "to the regular size that could be expected at that time for U.S. No. 1 prunes, the shipper breached the 3-car contract and could not therefore legally collect damages on the other two cars", and that the respondent was therefore not liable to complainant for damages in any sum, but, on the contrary, should recover from complainant the $300 advanced on the 3 carlots.

Various depositions were included in the record in support of the contentions of the parties and the decision quoted wires exchanged between complainant and the broker.

Federal-State shipping point certificates covering these shipments were included in the record and showed that both shipments graded U.S. No. 1, the prunes being mature, firm, clean and fairly well colored, no decay, grade defects within the tolerance. The fruit in one car was certified as generally ranging from 1-1/8 to 1½ inches in diameter, mostly 1¼ to 1-3/8 inches, and in the other generally ranging from 1-1/8 to 1-5/8 inches, mostly 1-3/8 to 1½ inches in diameter.

Rulings included in Decision

1. The examiner properly overruled the respondent's motion to dismiss the complaint, first, for the reason that the complainant never admitted, and the respondent failed to prove that the prunes contained in the first car failed to meet contract requirements, and second, this was a severable contract for 3 separate carlots of prunes to be shipped on different days and separate drafts were drawn by the complainant for the contract purchase price of the prunes contained in each car.

2. Respondent's rejection was without reasonable cause. It was clearly evident that the broker led complainant to believe U.S. No. 1 prunes would be acceptable to respondent. The confirmation of sale dated August 29, 1935 and signed by Nate Rubin specified an f.o.b. sale of "3 cars La Paloma brand Idaho prunes at 75¢ f.o.b., U.S. No. 1, faced half bushels." Respondent's act of signing the standard confirmation of sale must also be considered as a definite assurance to the complainant that U.S. No. 1 prunes would be acceptable. There could be no doubt but that the complainant shipped U.S. No. 1 prunes. Complainant was therefore awarded $1100.57, with interest.

Appeal

An appeal to the U.S. District Court was filed by respondent. On motion of complainant the suit was dismissed and the Secretary's order was vacated by court order of November 2, 1938.

S-1921, June 21, 1938 and March 13, 1939: (Hearing)

DOCKET 2867, W.A.WILLIAMS, FORT VALLEY, GA.	)	
DOCKET 2868, GEORGE T. DIGBY COMPANY, WHEELING, W. VA.	)	
DOCKET 2869, J.T. MERRION, WINTER HAVEN, FLA.	)	Complainants
DOCKET 2873, J.R. PAXTON, MERCEDES, TEXAS	)	
DOCKET 2870, H.A. SPILMAN, WASHINGTON, D.C.	)	
	)	
v.	)	
	)	
H.E. HALL, INDIANAPOLIS, INDIANA	)	Respondent

Violation charged: Failure truly and correctly to account to shippers and brokers.

Principal points involved: Filing of claims in bankruptcy proceedings justifies dismissal under the act; disciplinary proceeding not limited to determination as to whether respondent has adjusted his obligations but includes determination whether he has violated provisions of Perishable Agricultural Commodities Act; bankruptcy proceedings in no way interfere with disciplinary complaint.

Order: Complaints of W.A.Williams, George T. Digby Co., Inc., J. T. Merrion and J. R. Paxton, dismissed; respondent's license No. 135 suspended 90 days, effective only in event of further violation of act within two years from March 18, 1939.

Outline of Facts

Disciplinary complaint was brought by H.A. Spilman, of the U.S. Department of Agriculture, charging respondent with failure truly and correctly to account to the shippers and brokers in the following transactions covered by reparation complaints:

During August and September, 1936, W.A.Williams purchased for the account of and at the direction of respondent 10 carloads of watermelons for the total agreed sum, including brokerage, of $685, and also, acting as broker and in accordance with respondent's instructions, shipped or caused to be shipped 10 carloads of watermelons, on 5 of which Williams made advances to the growers, leaving due him the amounts advanced, including brokerage, or a total of $225. The 20 carloads were shipped from points in Georgia to Cincinnati, Ohio, where they were accepted by respondent, who failed to pay the balance of $910 due on them.

On or between July 31 and August 6, 1935 and on August 25 and 26, 1936, George T. Digby Co., Inc., acting as broker for respondent, negotiated the sale of 5 carloads of watermelons, thereafter shipped from Georgia to destinations in West Virginia and Ohio, for which services respondent refused to pay the agreed price of $15 per carload, or a total of $75.

During the month of August, 1936, J.T.Merrion sold to respondent 5 carloads of watermelons at the agreed price of $440.75 f.o.b. shipping points in Georgia and upon arrival at Cincinnati, Ohio they were accepted by respondent who failed to pay the purchase price.

On or about June 22, 1937, J.R.Paxton sold to respondent a carload of tomatoes at 80¢ per lug f.o.b. loading point in Mississippi, to be inspected and accepted at Indianapolis, Ind. 650 lugs were shipped and were accepted by respondent, who failed to pay the contract price of $520.

The disciplinary complaint also included failure of respondent to account to General Distributors, Inc., of Buffalo, N.Y., for services as broker in the sale in interstate commerce of 11 carloads of watermelons, for which respondent contracted to pay brokerage of $15 per car, or $165.

Respondent admitted in his testimony at the hearing that he had become indebted to each of the above named shippers and brokers, but his attorney, at the close of the hearing, offered in evidence a certified copy of an order dated February 2, 1938, by the U.S. District Court for the Indianapolis Division of the Southern District of Indiana, adjudicating respondent a bankrupt.

Rulings included in Decision

1. The complaints filed by W.A. Williams, George T. Digby Co., Inc., J.T.Merrion and J.R. Paxton were dismissed without prejudice since the Clerk of Court advised that their claims had been properly scheduled and since their claims will be satisfied in the bankruptcy proceedings.

2. The bankruptcy proceedings in no way interfered with the disciplinary complaint of H.A. Spilman since the violation of the act complained of was failure to settle promptly with certain shippers and brokers, which was admitted by respondent. A disciplinary proceeding is not limited to a determination of whether the respondent has adjusted his obligations to the satisfaction of the parties to whom they are owing or has been discharged of them by a bankruptcy court. Such a proceeding has in view a determination as to whether the respondent has been guilty of any conduct declared unlawful by the Perishable Agricultural

Commodities Act, to the extent and under the circumstances and conditions which call for the application of the penalties prescribed therein. For example, flagrant or repeated violations of the statute are cause for revocation of a license and for refusal of a new license at any time within two years after such revocation. Respondent's license No. 135 was suspended for a period of 90 days, effective only in the event that within two years from date of service the Secretary shall have reason to believe that respondent has again violated any of the provisions of the act or any of the regulations.

S-1944, July 19, 1938, Docket 2832: (Hearing)

H. A. SPILMAN, WASHINGTON, D.C. v. FRANK C. CRISPO, INC., CHICAGO, ILLINOIS.

Violation charged: Failure to account.
Principal point involved: Failure to account constituted repeated and flagrant violations of the act warranting revocation of respondent's license, were it in effect.
Order: The facts were ordered published, but later this order was revoked and the case dismissed.

Outline of Facts

Disciplinary complaint was filed by H.A. Spilman, an employee of the U.S. Department of Agriculture, based on the following sales to respondent during the summer of 1937, as brought out by the record and testimony in this proceeding, of lettuce which moved in interstate commerce and was accepted by respondent at Kansas City, Mo., and Chicago, Illinois:

Sold by	Quantity	Balance due
F. V. Birbeck, Watsonville, Calif.	3 carloads	$1,524.00
Cleverly & Thompson, Salinas, Calif.	1 carload	460.00
W.B. Grainger Packing Co., Salinas, Calif.	1 carload	490.00
Holme & Seifert, Salinas, Calif.	2 carloads	946.40
Ice-Kist Packing Co. Salinas, Calif.	1 carload	508.00
Hubbard Bros., Watsonville, Calif.	4 carloads	1,876.00
M. L. Kalich & Co., Watsonville, Calif.	4 "	1,844.80
Matsuura & Marui Packing Co., Watsonville, Calif.	2 "	984.80
Watsonville Exchange, Watsonville, Calif.	1 carload	469.75
		$9,103.75

Respondent claimed he did not purchase any of the shipments here under consideration, knowing that he could not pay for them, and did not issue checks in payment for some of them without reason to believe that they would be cashed by the bank with which he had established a line of credit.

Ruling included in Decision

Respondent's failure truly and correctly to account for the various shipments of produce constituted repeated and flagrant violations of section 2 of the Perishable Agricultural Commodities Act, 1930, as amended, such as would warrant the revocation of respondent's license, were it still in effect. The facts were therefore ordered published. However, by Secretary's order October 27, 1938, this order was revoked and the case dismissed.

S-1950, July 19, 1938, Docket 2824: (S.P.)

THE NASH-FINCH CO., OKLAHOMA CITY, OKLA. v. ATLANTIC COAST PRODUCE CO., DELRAY BEACH, FLORIDA.

Violation charged: Failure to ship a carload of green beans in accordance with contract specifications.
Principal point involved: In f.o.b. sale complaint that hampers were not well filled must be sustained by proof they were not well filled when shipment was made.
Order: Complaint dismissed.

Outline of Facts

On or about November 16, 1936, through a broker, complainant purchased from respondents a carload of "572 hampers of fancy giant stringless beans, not affected by rain, will arrive fresh, sound, @ $1.25 per hamper f.o.b." The beans, which previously had been shipped from Florida, were thereafter diverted while in transit to complainant at Oklahoma City, Oklahoma, and on arrival at destination were unloaded by complainant. Thereafter complaint was made that the hampers were not well filled and an allowance was requested, which was refused by respondents, and the full amount of the purchase price was paid by complainant. This proceeding was brought by complainant for the recovery of $194.18, which was claimed to be the difference between the value of the shipment as received and what it would have been worth had the hampers been properly filled.

Ruling included in Decision

The contract specified an f.o.b. sale of 572 hampers of fancy green beans. The presumption was, of course, that the parties contemplated full hampers and the respondents submitted depositions of two witnesses to show that they were packed full at the time the car was loaded. The record showed conclusively that complainant unloaded the car and apparently made no complaint whatever concerning the shipment until some time thereafter when the objection was raised that the hampers had not been properly filled by respondents. In support of this contention complainant submitted considerable testimony to show that the hampers were not well filled when examined at its place of business, and that no material loss or shrinkage should be experienced in transit from Florida to Oklahoma City. Conceding that such was the case, there was no positive showing that complainant sustained the burden of proving that the hampers were not well filled when shipment was made, nor even immediately on arrival at destination. The car was unloaded, and some two or three days thereafter complaint was made that the hampers were not well filled. Clearly, there was nothing in the agreement to the effect that the hampers should contain any certain number of pounds of beans. Since complainant failed to show that the hampers were not so filled when shipment was made the complaint was dismissed.

S-1951, July 19, 1938, Docket 2863: (Hearing)

PHILADELPHIA PRODUCE CREDIT & COLLECTION BUREAU, PHILADELPHIA, PA. v. ARANOW & PAUL, INC., ATLANTIC CITY, N.J.

Violation charged: Failure truly and correctly to account for various lots of produce.

Principal points involved: Secretary unable to give effective relief when assets are under jurisdiction of Bankruptcy Court; while in bankruptcy respondent could not have paid its indebtedness to these assignors without preferring one creditor over another.

Order: Complaint dismissed.

Outline of Facts

On October 19 and October 27, 1937, claims of various Philadelphia produce dealers against respondent were assigned to the complainant herein and complainant asked for an award of $2351.46, the total amount due for produce sold to respondent during the period between September 13 and October 8, 1937. The greater portion of the commodities in question were purchased by the assignors of complainant from outside the State of Pennsylvania and the produce was shipped to the assignors in Philadelphia, Pa., where it remained undisturbed in the original packages either in the railroad cars or trucks in which it arrived when sold to respondent. It was admitted by the parties that respondent made the purchases outright from complainant's assignors and that the commodities were taken by truck to respondent's place of business at Atlantic City, N.J. and there sold to the retail trade.

Respondent claimed inability to pay complainant because it was bankrupt.

Ruling included in Decision

Respondent was adjudicated a bankrupt on December 13, 1937 and the assets of respondent are within the jurisdiction of the Federal Court of Bankruptcy. Respondent could not have paid the indebtedness to the assignors without preferring one creditor over another. Since under these circumstances the Secretary of Agriculture could not give any effective relief by way of an award of reparation, it was unnecessary to consider the issues in the case and the complaint was dismissed without prejudice.

S-1957, July 23, 1938, Docket 2760: (S.P.)

WINTER HAVEN FRUIT SALES CORPORATION, WINTER HAVEN, FLORIDA v. A. B. HATTAWAY, GREENVILLE, S.C.

Violation charged: Failure truly and correctly to account for a carload of oranges.
Principal point involved: Buyer liable for unpaid balance due on fruit accepted by him.
Order: Complainant awarded $270.60 plus interest.

Outline of Facts

On October 30 and 31, 1936, respondent ordered from complainant a carload of oranges to consist of 150 boxes Whip and Trutone oranges, 50 boxes grapefruit, 50 boxes tangerines, and 25 boxes of Temples, and promised to remit in full within five days after receipt of the shipment and stated that sales of the fruit would be made for cash only. He also promised complainant that he would "open a bank account at Woodside National Bank in your name, depositing full invoice to your credit, sending you signed bank deposit slip." On November 3, complainant telegraphed respondent that no tangerines were available and that it was shipping a larger quantity of Whip variety of oranges than was ordered by the respondent, and that day made shipment of a car of fruit, at $370.60 f.o.b. shipping point with draft drawn for the invoice price, consisting of 68 boxes of Trutone Pineapple oranges, 104 boxes of Whip Pineapple oranges, 32 boxes of Whip Hamlin oranges and 6 boxes of Whip Norris Seedless oranges. Upon arrival at Greenville, S.C. on or about November 6, the fruit was accepted by respondent and on January 29, 1937, he paid $100 on account, leaving a balance unpaid amounting to $270.60. No official form of inspection was requested by respondent. On November 9, complainant wrote respondent that it had sent its draft to the Woodside National Bank and was informed that the bank was no longer in business. As a matter of fact, the bank had been out of business for a number of years.

Respondent alleged that after he accepted the shipment he sold portions of the fruit to various customers in and around Greenville, but was unable to collect payment therefor because of the bad condition of the fruit. In his answer he stated that he would pay the complainant when he, in turn, had received payment from his customers.

Ruling included in Decision

It was clear from the record that the respondent failed to account to complainant for the commodity he had purchased and accepted. His letters and telegrams, attached to the complaint as exhibits, together with his answer replying to the complaint, were replete with misstatements of facts, misrepresentations and unfulfilled promises. He accepted the shipment tendered to him by complainant and should be held accountable for its payment. Complainant was therefore awarded $270.60, plus interest.

S-1962, July 28, 1938, Docket 2854: (S.P.)

R. H. DIETZ & CO., CHICAGO, ILL. v. JACOB J. WEINREB, SYRACUSE, N.Y.

Violation charged: Unjustified rejection of a carload of watermelons.
Principal point involved: Watermelons with an average of 5% showing stem end rot or soft rot due to field diseases were not in suitable shipping condition.
Order: Complaint dismissed.

Outline of Facts

On July 13, 1937, through a broker, complainant sold to respondent one carload of Cuban Queen variety, U.S. No. 1 grade, 26 pound average watermelons, $75 f.o.b. shipping point. The melons were shipped from Vienna, Georgia, to Syracuse, N.Y. and upon arrival were rejected by respondent who claimed that they did not meet the terms of the contract and introduced testimony, through its employees, two inspectors for the Railroad Company, and the director of the Bureau of Food and Sanitation, City of Syracuse, that the melons, upon arrival in Syracuse, were showing ground rot and stem end rot.

Government inspection at shipping point showed the melons graded U.S. No. 1. A Federal inspection for condition at destination showed the load to have shifted with many melons crushed, cracked, or split, and with some decay. It also showed "elsewhere throughout load averaging about 5% melons show stem end rot or soft rot entering the melon from ground scars or the stem".

Ruling included in Decision

The finding of the Federal inspector at destination agreed with that of the railroad inspectors. This percentage of decay due to field diseases was considered, in the absence of any evidence that transportation service and conditions were not normal, as constituting abnormal deterioration. It was therefore held that the melons were not in suitable shipping condition and, since the contract was not complied with, respondent's rejection was not without reasonable cause. The complaint was therefore dismissed.

S-1965, August 1, 1938, Docket 2749: (Hearing)

W. SHAPIRO & CO., NEW YORK, N.Y. v. MYLES L. GREEN, PAHOKEE, FLORIDA.

Violation charged: Failure truly and correctly to account for a deficit incurred in handling two cars of tomatoes.

Principal points involved: Commission merchant is without authority to buy in at an arbitrary figure without the seller's consent, property sent to him for sale on consignment; impossibility of identifying sales of produce so bought in and which lost its identity in repacking department made impossible figuring of actual deficit incurred by commission merchant.

Order: Complaint dismissed; countercomplaint dismissed.

Outline of Facts

On or about March 26, 1937, through its agent, complainant entered into an agreement with respondent whereby respondent agreed to ship two cars of tomatoes for sale on consignment and complainant advanced $2100 on the cars. The cars were shipped from Florida to New York City and after endeavoring to sell the tomatoes for two or three days, and actually having one sale rescinded because of the condition, complainant, by telegram of March 31 to its agent, stated that complainant was paying $2.25 for the 6x6's and $1.50 for the 6x7's. Accordingly, complainant issued account sales showing the sale of 600 lugs, 6x6's, at $2.25 out of one car. After deducting the advance of $1200, inspection, sorting and freight charges, and 7% commission, there was a deficit of $242.14 on that car. The account sales on the other car showed 100 6x7's sold at $1.75, 496 6x7's at $1.50, and 4 lugs, 7x7's, at $1.50. After deducting charges, the advance, and commission, there was a deficit of $333.39 on this car. Complainant therefore requested respondent to pay him the alleged deficit of $575.53 on the two cars.

Respondent alleged that the tomatoes were handled improperly in New York. He filed a countercomplaint for $300, the alleged sum he would have received had the tomatoes been handled properly by complainant.

Government inspector at shipping point certified the cars as U.S. No. 1, but an appeal inspection at destination reversed the shipping point inspection on one car, showing that grade defects averaged 12%, with decay running from 3% to 10%, mostly 3% to 6% in many samples. Destination inspection on some of the lugs of tomatoes unloaded from the other car showed 8% grade defects, about 3% decay.

Rulings included in Decision

1. The account sales showed that only 100 lugs out of both cars were sold by complainant to a third party. The remaining lugs were bought in by complainant, sent to its repacking department, repacked, and sold to the trade under a different brand. An investigation of the complainant's records by a representative of the Department of Agriculture showed that it was impossible to ascertain what the repacked tomatoes actually brought since they lost their identity when placed in the repacking department. It has been consistently held that a commission merchant is entitled to the deficit where he uses proper care in disposing of the commodity. Due to the nature of the relationship between a shipper and commission merchant, extreme caution and care must be exercised by the merchant when he buys property for his own use which has been sent to him on consignment to be sold for the account of the shipper. It is absolutely necessary that the shipper be informed of all of the facts and that he fully consent to such action on the part of the commission merchant. The record in this case did show a telegram of March 31 from the complainant to its own agent advising that they were buying in the commodity; but the record did not show that respondent ever agreed to this action. Under the circumstances, it was held that complainant was acting without authority in buying in these tomatoes at an arbitrary figure without the consent of the respondent. Since complainant's records did not disclose the sales of the repacked tomatoes from the cars in question, it was impossible to arrive at the amount, if any, due complainant as a deficit. The complaint was therefore dismissed.

2. Respondent's counter complaint for $300 was not supported by sufficient facts to show that he had actually been damaged in any amount. The record did not show that the tomatoes would have brought the price on the New York market alleged by respondent.

S-1966, August 1, 1938, Docket 2785: (S.P.)

WESTERN FRUIT GROWERS, INC., LOS ANGELES, CALIF. v. J. F. SANSON & SONS, CLEVELAND, OHIO.

Violation charged: Unjustified rejection of a carload of plums.
Principal points involved: Buyer bound by action of broker as its agent; complainant must prove delivery as alleged and that rejection was without reasonable cause.
Order: Complaint dismissed

Outline of Facts

On June 21, through an exchange of wires, a broker negotiated the sale by complainant to respondents of one carload of U.S. No. 1 American Beauty plums at $1 per crate or $1050, f.o.b. California shipping point, if wired shipping point inspection certificate was satisfactory. During the evening of the same day complainant wired the broker: JUST RECEIVED GOVERNMENT INSPECTION CERTIFICATE SHOWS AS FOLLOWS: PACKED TIGHT COMBINATION COLLARS AND SHIMS IN BASKET PACK FAIRLY UNIFORM CONFORMS TO DESCRIPTION PLUMS MOSTLY HARD MANY FIRM GENERALLY WELL FORMED FULL STRAW COLOR IN ADDITION MOST SHOW TRACE TO HALF RED COLOR USONE STANDARD PACK ***. One of respondents testified that on examining this telegram, which was shown to him on the morning of June 27, he thought it showed more color than desired and therefore declined to accept the car as confirmed. The broker then wired complainant: SANSON ADVISED DOES NOT LIKE GOVERNMENT INSPECTION THEREFORE CANCEL UNLESS YOU WISH CONFIRM USONE ARRIVAL *** ADVISE. Complainant replied immediately to the effect that shipment met contract requirements and that respondents would have to take it. Respondents claimed that when told of complainant's refusal to confirm U.S. No. 1 arrival the broker was told they didn't want the car at all and that when the broker advised he would wire complainant again in an effort to get confirmation "U. S. No. 1 delivered Cleveland" he was told again that they did not want the car. The broker, however, testified that respondents in no way indicated that the agreement would be unsatisfactory on a delivered basis and he thereafter wired complainant concerning the shipment and complainant confirmed it on the basis of U.S. No. 1 arrival. Shipment was made from California loading point and arrived at Cleveland on June 26, when it was refused by respondents on the ground it had not been purchased. Resale at auction resulted in proceeds of $570.55, which failed to equal the contract price by $459.45, which complainant sought to recover.

Ruling included in Decision

Respondents were bound by the action of their agent in confirming the subsequent contract which provided for delivery of U.S. No. 1 plums at Cleveland, Ohio. Complainant, however, failed to prove that U.S. No. 1 plums were delivered at Cleveland, Ohio, and that the respondents' rejection was without reasonable cause. The complaint was therefore dismissed.

S-1967, August 1, 1938, Docket 2431: (S.P.)

TRACY WALDRON FRUIT CO., SALINAS, CALIF. v. S. LANDOW FRUIT & PRODUCE CO., INC., NEW HAVEN, CONN.

Violation charged: Failure truly and correctly to account for two carloads of grapes.
Principal point involved: Twenty-four hour period does not begin to run until car placed by carrier where inspection can be reasonably made.
Order: Complaint dismissed

Outline of Facts

On or about October 5, 1935, respondent placed its order for the purchase in interstate commerce of 10 carloads of U.S. No. 1 Juice Muscat Grapes and thereafter, on or about October 10, placed an order for an additional 4 carloads of U.S. No. 1 Juice Grapes, at 90¢ per lug delivered to respondent at New Haven, Conn. Two carloads of these fourteen covered by this complaint were in the Silver Street yard at New Haven at about 6 a.m. October 17, but one car was located under a bridge while the other car was on a switching track and neither of these locations afforded respondent an opportunity to make with safety a satisfactory inspection. The carrier notified respondent of arrival by mailing a postcard which respondent received at about 9 a.m. October 18 and the two cars were, at about 8:30 a.m. that date, placed on a track used for switching purposes. Respondent made inspection while the cars were there and at about 11:30 a.m. that day notified the broker representing complainant that the grapes were not of the kind and quality ordered and that respondent would not accept them. Complainant maintained that respondent's rejection was not made within 24 hours and therefore the grapes must be considered as accepted by respondent.

Copies of Federal inspection certificates based on inspection made at New Haven, October 18, attached to and made a part of respondent's answer, appeared to have been issued on an inspection to determine condition only. The inspector certified that the Muscat Grapes were fairly well to well attached, 1% or less shattered, most berries fairly firm to firm, many soft and weak, averaging 3% to 6% crushed berries, 1% decay, and in most lugs in one car and in many lugs in the other car contents were wet.

Rulings included in Decision

1. The grapes did not conform to complainant's warranty. U.S. Standards for European grapes, including Juice Muscat Grapes, provide that U.S. No. 1 Juice Grapes shall consist of bunches of well developed berries *** which are not weak, loose at capstems, shattered, split, crushed, or wet; which are free from *** mould or decay ***. It is further provided that in order to allow for variations incident to proper handling, not more than 10% by weight of the grapes in any container may be below the requirements of the grade, and not more than 5% by weight may be seriously damaged, but no more than 2% may be affected by decay. It will therefore be seen that while the Federal inspector did not determine the grade of the grapes he did certify to facts, which indicate that at destination more than 10% were below the requirements for the grade, and in one car more than 5% of Muscat variety were seriously damaged, and that the grapes were not, in fact, at the time of inspection Grade U.S. No. 1 Juice Grapes.

2. The obvious purpose of regulation 1, section 3, paragraphs 11 and 12, is to give the buyer a reasonable opportunity to inspect the produce so as to determine whether it conforms to the seller's warranty. The buyer may have not to exceed 24 hours to make such inspection, or to apply for a Federal inspection. The 24 hour period does not begin to run until the carrier has placed the car at some point where the inspection can be reasonably made. It was not shown in the instant case that respondent hindered the carrier in placing the cars for inspection, or that respondent had issued any general instructions which operated to that effect. Respondent's notice of rejection of the two carloads was made within 24 hours after receipt of notice of arrival and placement of the cars where they could be adequately and reasonably inspected. The complaint was therefore dismissed.

S-1970, August 4, 1938, Docket 2944: (Hearing)

ELMER G. PORTER, CAYWOOD, N.Y. v. GOLDBERG BROTHERS, NEW YORK, N.Y.

Violation charged: Failure truly and correctly to account for truckloads of grapes handled on consignment.
Principal point involved: Secretary of Agriculture is without jurisdiction when contract is not entered into in interstate commerce.
Order: Complaint dismissed.

Outline of Facts

During the last week of October, 1937, complainant consigned five truck shipments of Concord grapes to respondents who were to sell them on consignment at or above certain prices specified by the complainant. Respondents disregarded complainant's instructions concerning the prices at which they were to be sold and this proceeding was brought to recover the sum of the differences between the minimum prices and the prices at which the grapes were sold, as evidenced by the accounting rendered by respondents; namely, $133.88.

Ruling included in Decision

It was unnecessary to give consideration to complainant's claim for damages since it appeared from the evidence adduced at the hearing that both complainant and respondents live in the State of New York, that the grapes which were the subject of the contract were grown in New York, and that it was not contemplated that they would move interstate. Complainant testified at the hearing that it was his understanding that because of a temporary detour they were transported for some distance through the State of Pennsylvania. Respondents waived proof of such movement, but there was no showing that the parties anticipated shipment outside of the State of New York when the contract was entered into and no definite evidence that the grapes did leave the State. It was doubtful whether jurisdiction could be conferred by such waiver, but the contract could not be said to have been entered into in interstate commerce within the meaning of that term as used in the Perishable Agricultural Commodities Act, 1930, as amended, and the Secretary of Agriculture was without jurisdiction. For these reasons the complaint was dismissed.

S-1973, August 11, 1938, Docket 2814: (S.P.)

MAX HARWITZ & CO., MILWAUKEE, WISCONSIN v. SOUTH TEXAS PRODUCE CO., McALLEN, TEXAS.

Violation charged: Failure to deliver a carload of grapefruit in accordance with contract.
Principal point involved: Inspection showing decay a week after arrival of fruit did not prove fruit not "sound arrival" in view inspection week before arrival showing fruit sound when shipped.
Order: Complaint dismissed.

Outline of Facts

On or about February 16, 1937, through a broker, complainant purchased from respondents one carload of Texas combination U.S. No. 1 and U.S. No. 2 pink Marshseedless grapefruit of certain specified sizes, at the f.o.b. price of $1.45 per box, respondents guaranteeing that the shipment would be sound upon arrival at Milwaukee, Wisconsin. Thereafter 360 boxes of fruit were shipped from McAllen, Texas and arrived at Milwaukee on or about February 19, and were thereafter unloaded and the contract purchase price of $522 was paid on or about February 24, unloading apparently being completed two or three days later. Complainant claimed that the shipment was not in good condition upon arrival and sought to recover $359.55, but failed to show how it arrived at that sum. The shipment was sold by complainant for $630.45. Against that sum complainant set up $522 paid to respondents, freight charges of $306, cost of Government inspection of $4, independent inspection of $1.50, and demurrage charges of $6, or a total of $839.50, which was $209.05 in excess of the sum received for the shipment. Several depositions were submitted by complainant to show the quality, condition and size of the grapefruit at destination and the respondents furnished depositions to show that the fruit was sound at the time of shipment.

Federal-State inspection at McAllen on February 13, showed that the grapefruit graded "U.S. Combination, with approximately 45% U.S. No. 1 quality," "Stock mature, firm, well formed to slightly misshapen, fairly well to slightly colored, fairly smooth to slightly rough texture, no decay; grade defects within tolerance." Federal inspection of 275 boxes on February 26, restricted to condition, showed "Stock is firm. Decay ranges from 2% in some boxes to 20% in others, average for lot approximately 13%; decay is Blue Mold Rot in various stages, generally following skin bruises or punctures."

Ruling included in Decision

There was no positive showing of the quality and condition of the grapefruit at the time of arrival at destination. The Federal inspection, which was the best evidence submitted by complainant, was not secured until approximately a week after the shipment arrived at destination and after respondents directed that such inspection be secured. This, together with the fact that the shipping point inspection indicated that the grapefruit was sound at the time of shipment, approximately a week before arrival at destination, led to the conclusions that the complainant failed to prove its case and the complaint was therefore dismissed.

S-1975, August 11, 1938, Docket 2890: (S.P.)

T.E. STEPHENS, EDINBURG, TEXAS v. CHARLES TAXIN CO., PHILADELPHIA, PA.

Violation charged: Failure truly and correctly to account for a carload of tomatoes.

Principal points involved: Respondent responsible for incorrect statement made; no valid modification of contract because based on incorrect statement; contract price not sufficient evidence of market value because not reflecting fluctuations; judicial notice taken of market news reports.

Order: Complainant awarded $60.13 plus interest; publication of facts; by subsequent order of January 14, 1939, complaint dismissed without prejudice.

Outline of Facts

On or about May 5, 1937, respondent purchased from complainant at $770.35 f.o.b. Edinburg, Texas, one carload of tomatoes, consisting of U.S. No. 1 Trulyn brand at $1.75 per lug, U.S. No. 1 Jakalak brand at $1.90 per lug and U.S. No. 2 Vagabond brand at $1.15 per lug, shipped from Texas loading point on May 1 and diverted on May 4 to the Baldwin Pope Marketing Co. at St. Louis, Mo. Thereafter the car was diverted to respondent at Philadelphia, Pa., where it was accepted. Respondent remitted to complainant only the sum of $240.28.

Respondent admitted the purchase but contended that complainant "represented that the said tomatoes were of fine quality and that they were not ripe"; that respondent, pursuant to a telegraphic report from the Baldwin Pope Marketing Co., to the effect that inspection of the tomatoes at St. Louis "showed 75% ripe and turning", advised complainant that the respondent was unwilling to accept the tomatoes and that complainant agreed upon a modification of the original contract of sale; that under such modification complainant directed respondent to pay the draft and sell the tomatoes for the account of complainant, and that any difference would be adjusted.

Federal-State of Texas inspection certificate, dated May 1, certified the Jakalak and Trulyn brands as U.S. No. 1 and the Vagabond brand as U.S. No. 2. Federal appeal inspection at Philadelphia, on May 10, reversed the shipping point inspection as to the grade of the Jakalak and Trulyn brands, but sustained it as to the grade fixed for the Vagabond brand. The appeal inspectors certified that "in most lugs" containing Trulyn and Jakalak brands, there were "8% to 12%, some 20% to 30% defects, chiefly scars, puffy, some insect or mechanical injury;" that "in 'vagabond brand' stock free from decay averages 5% turning, 55% ripe and firm and 40% ripe and soft; *** In most lugs 20% to 30% decay, many 4% to 8%, few none. *** In most lugs 1/3 to practically all of tomatoes show slight to severe shriveling. In 'Trulyn' and 'Jakalak' brands stock free from decay averages 10% mature green, 35% turning, 35% ripe and firm and 20% ripe and soft; 1% decay."

Rulings included in Decision

1. With reference to the alleged modification of the original contract of sale, respondent had the burden of proof. It appeared from the evidence that respondent reported to complainant that an inspection of the tomatoes at St. Louis disclosed that they were 75% ripe. A Federal appeal inspection made after arrival of this shipment at Philadelphia disclosed that the Vagabond brand was 95% ripe but that the Trulyn and Jakalak brands were only 55% ripe. It was clear, therefore, that the representation made by respondent, to the effect that inspection at St. Louis disclosed that the tomatoes were 75% ripe, was not a correct statement of the fact. Respondent clearly showed that the misstatement of fact was not intentional by submitting as respondent's exhibit a telegram from the Baldwin Pope Marketing Co. which stated that the tomatoes were 75% ripe and turning. However, even though respondent was able to show that the incorrect statement was based on information received from the Baldwin Pope Marketing Co., responsibility for such statement could not

be avoided, as complainant was not advised as to the source of the information. On the contrary, the statement was made by respondent's representative as a statement of fact and the respondent must accept responsibility for it. Furthermore, the record did not clearly show the position of the Baldwin Pope Marketing Co., in this transaction, and whether it was authorized to make an inspection and report to respondent as to the ripeness of the tomatoes in question. The record further showed that complainant, as a condition to the alleged modification of the contract, demanded that the respondent pay the draft, which respondent failed to do. It was concluded that there was in fact no valid modification of the contract, because it was induced by an incorrect statement of fact, and that the respondent failed to comply with all the conditions imposed under the alleged modified contract. The original contract would therefore control the respective rights and duties of the parties.

2. Complainant's allegation that the contract was made expressly on the basis of a shipping point inspection certificate was denied by respondent. In the absence of other evidence, it was concluded that the contract called for tomatoes of certain specified grades. The appeal inspection certificate conclusively showed that the tomatoes were not of the grade originally specified. Therefore, complainant failed to ship tomatoes which met contract specifications. However, respondent accepted and resold the tomatoes, thereby becoming liable to complainant for the full contract purchase price less any damage incurred by reason of complainant's breach of contract. The market value of the tomatoes delivered was $651.90, the gross amount realized by respondent from the sale thereof. The only evidence of the value of the commodity which should have been delivered was the contract price. Normally, this would not be sufficient evidence of the market value, because it did not reflect the fluctuations in market prices. However, judicial notice was taken of market news reports issued by the Department of Agriculture which disclosed that the market prices of Arkansas tomatoes on the Philadelphia market, during the period in question, remained practically unchanged. Therefore, it was evident that the damage suffered by respondent was occasioned by the defectiveness of the commodity delivered and not as a result of any decline in the market. It was concluded that respondent was damaged as a result of complainant's failure to deliver tomatoes which complied with contract specifications in the amount of $469.94, the difference between $1,121.84, the contract price including freight, and $651.90, the market value of the commodity actually delivered. This damage might properly be set up in diminution of the contract purchase price of $770.35,

leaving a balance of $300.41. The record showed that respondent remitted to complainant $240.28, after deducting $60.13, consisting of $45.63 representing selling charges, $5.50 representing inspection fees, $7 representing terminal charges, and $2 representing demurrage. The amount of $60.13 for these expenses was not properly assessable against the complainant under the original contract of sale and complainant was therefore awarded that amount plus interest.

3. It appeared from the record, as evidenced by the verified answer and the affidavit of Edward Taxin, that during the times and dates referred to in the complaint, Charles Taxin and Edward Taxin were operating as a partnership engaged in the business of buying and selling perishable agricultural commodities as a commission merchant, dealer, and/or broker, under the name of Charles Taxin Company, although the records of the Department of Agriculture did not disclose that they were licensed to operate as a partnership. The records of the Department, at the time of the transaction in question, showed that Charles Taxin was licensed under the act to operate as an individual. By operating as a partnership without a license, Charles Taxin and Edward Taxin violated section 3(a) of the act.

Reconsideration

Upon respondent's request for reconsideration the above order was revoked and the entire record reopened. Subsequently complainant filed a motion to dismiss the complaint. Complaint was dismissed without prejudice by order of January 14, 1939. Respondent then filed application for reconsideration of the dismissal order because the complainant had or expected to prosecute the same cause of action in the State Court of the State of Texas. The general rule is that a complainant has control over his complaint and, as a matter of right, may dismiss the complaint at certain stages of the proceeding; that thereafter, it is within the sound discretion of the court to dismiss, upon complainant's application, but, in the absence of a counter-claim, complainant is ordinarily granted the right to dismiss, although costs may sometimes be assessed in recognition of statutory requirements or rules of court. In an equity case the court held that the prospect of future litigation was not sufficient cause to deny the complainant's application to dismiss. Respondent's application was denied.

S-1981, August 27, 1938, Docket 2758: (S.P.)

STEEL CITY FRUIT CO., INC., PITTSBURGH, PA. v. DEASON & MOORE, BARNWELL, S.C.

Violation charged: Failure truly and correctly to account for a deficit incurred in selling two carloads of cantaloupes on consignment.
Principal points involved: Wire to consignor reading "can handle advantage" equivalent to guaranteed advance; testimony as to previous relations supports complainant's contentions.
Order: Complaint dismissed.

Outline of Facts

On July 2, 1937, respondents consigned two carloads of cantaloupes packed in standard and two-thirds crates, to be sold by complainant for respondents' account, upon which complainant advanced $495.25, the transaction being consummated through an exchange of telegrams between the parties, the pertinent portions of which were as follows:

STEEL CITY FRUIT CO. -CAN YOU HANDLE GOOD QUALITY CANTALOUPES LOADING FRIDAY AND SATURDAY PROFITABLE TO US COSTING US STANDARD CRATES SEVENTY CENTS TWO THIRDS CRATES FIFTY CENTS STOP WILL YOU WIRE US ADVANCE SIXTY CENTS ON STANDARDS FORTY CENTS ON TWO THIRDS ** DEASON & MOORE

DEASON & MOORE *** CAN HANDLE ADVANTAGE TWO CARS DAILY IF QUALITY PACK GOOD ADVISE IF THESE ARE WRAPT WILL ADVANCE 50¢ STANDARDS 40¢ TWO THIRDS *** STEEL CITY FRUIT CO.

STEEL CITY FRUIT CO. *** YOU ADVANCE FIFTY FIVE CENTS STANDARD FORTY FIVE CENTS TWO THIRDS STOP YOU CAN WIRE US $495.25 *** DEASON & MOORE

DEASON & MOORE *** ANSWERING OKAY WILL TAKE TWO CARS TODAY *** WIRED FUNDS WESTERN UNION *** STEEL CITY FRUIT CO.

Complainant accepted the cantaloupes and in selling them incurred a deficit of $440.08, after making all deductions for freight, inspection, unloading, commission, and the amount advanced, for which amount this proceeding was brought.

Respondents contended that the cantaloupes were shipped upon a guaranteed advance of $495.25, and that if complainant failed to realize a sufficient amount to cover said advance, freight, commissions, etc., the loss was to be borne by complainant under the contract.

Ruling included in Decision

Respondents shipped the two carloads to complainant in reliance upon complainant's statement that it could handle the shipments to the advantage of the respondents. The statement of complainant, "Can handle advantage", in response to respondents' inquiry, "can you handle *** profitably to us ***", was in effect a warranty that complainant could sell the cantaloupes in question at a price equal at least to the amount of the advance. Complainant, by making such a representation to respondents bound itself to assume the risk of loss if the commodity sold for an amount less than that advanced. Thus, the effect of the warranty arising out of the exchange of telegrams between the parties was the same as if the parties had used the terms "guaranteed advance." The loss suffered by complainant was the result of its own failure to fulfill its contract. This conclusion was further supported by the uncontradicted testimony of B. S. Moore, Jr., who testified that a representative of complainant called upon respondents in 1935 in regard to the shipment of produce to the complainant and was advised that respondents shipped on guaranteed advances only. Complainant's representative agreed to such terms and respondents for about two years shipped various amounts of agricultural commodities to complainant, all of which were made on guaranteed advances. The above mentioned telegrams, when read in the light of this testimony, clearly indicated that respondents, in inquiring of complainant if it could handle cantaloupes profitably to them, giving the cost price and requesting an advance, were seeking to guarantee themselves against loss to the extent of the requested advance. In view of the prior transactions between the parties, complainant could not have reasonably interpreted the telegrams otherwise. The complaint was dismissed.

S-1987, August 31, 1938, Docket 2844: (Hearing)

AMERICAN FRUIT GROWERS, INC., PRESQUE ISLE, MAINE v. NICHOLAS AND ERNEST PEPE, trading as NICHOLAS PEPE, NEW YORK, N.Y.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: When contract is denied by one party its consummation must be definitely proved.
Order: Complaint dismissed.

Outline of Facts

On or about January 28, 1937, complainant's New York representative attempted to negotiate a sale in interstate commerce of a carload of potatoes to respondents. He contended that the sale was consummated and that on behalf of complainant he immediately mailed a standard confirmation of sale to respondents. The carload was shipped from loading point in Maine to New York, N.Y., where it was tendered to and refused by respondents, who contended that they never purchased it. Resale was made for $659.70, which failed to equal the sum for which complainant claimed to have sold it to respondents by $166.30, for which amount complainant asked for an award.

Ruling included in Decision

The record failed to contain a confirmation signed by anyone connected with the respondents' firm, and the broker was unable to furnish positive proof that a copy was placed in the mail addressed to respondents, who denied ever having received such confirmation. Since complainant failed to prove that a copy of the standard confirmation of sale, or other memoranda, fully setting forth the alleged contract of sale, was delivered to respondents, and failed to otherwise prove that the sale was consummated as alleged in the complaint and positively denied by respondents, the complaint was dismissed.

S-1989, August 31, 1938, Docket 2821: (S.P.)

FLORIDA CITRUS EXCHANGE, TAMPA, FLORIDA v. V. FAMULARO & SONS, DENVER, COLORADO.

Violation charged: Unjustified rejection of a carload of grapefruit.
Principal point involved: Change in terms of original contract must be proved to be by agreement of both parties.
Order: Complaint dismissed.

Outline of Facts

On or about September 17, 1936, through a broker, complainant sold to respondent one carload of Florida Marshseedless Grapefruit, approximately 55% to 60% Sealdsweet (U.S. No. 1) balance Morjuce (U.S. No. 2), approximately 20% size 126s, balance 64s to 96s, heavy 80s-96s, good quality and pack, at $2.25 f.o.b. shipping point for Sealdsweet and $2 f.o.b. for Morjuce, shipment to be made September 18 or 19, as set forth in the Standard Memorandum of Sale. Shipment was made from

Lake Alfred, Florida to respondent at Denver, Colorado where the car arrived September 25, and was rejected by respondent for the reason that the fruit did not comply with the size specifications of the contract. Resale was made to a Denver firm at $3.50 for Sealdsweets and $3.25 for Morjuce, delivered, or net proceeds of $666.95. Complainant asked for an award of $196.80, the difference between the original contract price of $863.75 and the net proceeds of the resale.

On September 21, by wire, complainant advised the broker of the shipment and requested quick confirmation giving the sizes as 64 to 126s 14 - 29 - 165 - 174 - 0 - 18, indicating that there were only 18 boxes of 126s in the shipment of 400 boxes, or, in other words, approximately 5% instead of 20% as required by the memorandum of sale. On September 21, the broker wired "Satisfactory Famularo your Alfred 242." Complainant claimed that the terms of the original contract of sale were changed by respondent approving the sizes quoted in complainant's telegram to the broker on September 21. However, it was admitted that no amended Memorandum of Sale was issued and no letter confirming any such variation from the terms of the original contract was sent.

Depositions of three members of the broker's staff were submitted, testifying that respondent was informed of the contents of complainant's wire, and that respondent did not object to the sizes contained in this shipment at that time. Respondent submitted his own deposition, together with that of two of his employees, in which they testified that respondent was not advised of the fact that the car did not contain sizes as required by the Memorandum of Sale until the shipment arrived in Denver on September 25, when the broker furnished respondent with the manifest of this shipment.

Ruling included in Decision

Respondent did not reject the grapefruit without reasonable cause. Complainant failed to establish that the terms of the original contract were changed by agreement and failed to establish that it offered for delivery grapefruit which met contract requirements.

S-1991, September 12, 1938, Docket 2896: (S.P.)

SYRACUSE FRUIT CO., INC., SYRACUSE, N.Y. v. PIONEER VEGETABLE EXCHANGE, INC., LOS ANGELES, CALIF.

Violation charged: Failure to account for alleged allowance.
Principal points involved: Acceptance and resale of produce by buyer created liability for agreed purchase price, regardless of alleged condition of produce at time of delivery; complainant must prove terms of subsequent agreement covering amount of allowance granted.
Order: Complaint dismissed.

Outline of Facts

On February 27, 1937, through a broker, respondent sold to complainant one carload of mixed vegetables (cauliflower, sprouts, chicory and broccoli) for a total net price of $683.10, the printed form of invoice containing the phrase "Acceptance shipping point final." Shipment was made on February 27 from Los Angeles, California to Syracuse, N.Y., where the vegetables arrived on March 8. Complainant claimed that inspection disclosed numerous defects as to quality and condition and that respondent agreed to an allowance of $133.90, to be paid immediately after the draft in the full amount of the contract purchase price had been paid, but that respondent paid only $40. Complainant requested an award for the balance of $93.90.

Respondent maintained that the allowance agreed upon was $40, the amount paid to complainant, and in support of this contention submitted the original affidavit of an employee setting forth the substance of a long distance telephone conversation between respondent and the broker, as heard on an extension telephone in the office of respondent, to the effect that the allowance of $40 was reluctantly granted by respondent to cover all claims of complainant, and a copy of a letter from respondent to the broker enclosing a check "covering allowance" on the car.

The original affidavit of the broker, attached to the complaint, averred substantially, that itemized allowances totaling $133.90 were made by respondent to deponent "in a long distance conversation" and that the complainant was thereafter immediately informed.

Neither party availed itself of the privilege of submitting a statement of facts, depositions or other corroborating testimony.

Ruling included in Decision

The evidence submitted by both parties established the fact that there was an acceptance and resale by complainant of the commodities contained in said shipment, which acts created a liability for payment of the agreed purchase price therefor, regardless of the alleged unsatisfactory conditions of said commodities at the time of delivery. The evidence regarding the amount of the allowance was contradictory. Complainant's proof consisted of an affidavit of the broker which indicated that the allowance was to be $133.90. Respondent's proof consisted of a letter transmitting the check for $40 which clearly showed that respondent intended the payment to be in full. Complainant accepted the check and cashed it. The affidavit of respondent's bookkeeper, who claimed to have heard the conversation between respondent and the broker, stated that respondent agreed to an allowance of $40. There was no proof of the exact damage to complainant resulting from the alleged defect in the quality of the commodities. Thus respondent's liability, if any, must be measured by the agreement. The burden of proof with respect to the terms of that agreement rested upon complainant and a careful consideration of the evidence led to the conclusion that complainant failed to show that respondent's liability was greater than the $40 tendered by respondent as full payment in accord and satisfaction of the alleged claim. The complaint was therefore dismissed.

S-1993, September 10, 1938, Docket 2878: (S.P.)

DESEL-BOETTCHER CO., VICTORIA, TEXAS v. T.P. BLAKE & BRO., INC., BOSTON, MASS.

Violation charged: Failure to deliver in accordance with contract 400 sacks of potatoes.
Principal point involved: Complainant's failure to establish by a fair preponderance of evidence its claim of shortage in excess of tolerance for shrinkage necessitated dismissal of complaint.
Order: Complaint dismissed.

Outline of Facts

On or about March 1, 1937, through a broker, respondent sold to complainant one carload, 400 sacks, of 85% U.S. No. 1 Maine Green Mountain potatoes, at $2.65 per 100-lb. sack, delivered, or for a total net invoice price of $701.24, after deducting freight and car rental charges, shipment to be made from Boston, Mass. The car in question had been received by respondent at Boston during December, 1936 and was loaded and shipped from Boston on or about March 3, by boat to Galveston, Texas, where it was reloaded into a car and then moved to Victoria, Texas. Complainant claimed that upon arrival at destination the potatoes weighed only 34,267 lbs., with 5,049 lbs. excess shrinkage, after allowing for the usual 2% tolerance, as the result of which they failed to meet the kind, grade and quality specified in the contract of purchase and caused complainant a loss of $133.80, the difference between the value had they met contract specifications and their market value at the time they were delivered to complainant. Complainant submitted an affidavit of an employee and a statement by the agent of the railroad in support of its contention as to weight.

Respondent maintained that at time of delivery to the steamship company the potatoes weighed 100 lbs. net per sack, and in support of its contention submitted affidavits of two of its employees and of the truckman who hauled the potatoes to the loading dock.

A copy of a letter submitted by respondent, dated December 28, 1937, from the general agent of the steamship company stationed at Boston, advised that Federal inspection certificate covering inspection at Boston, stated: "potatoes are firm An average of 6% dry rot decay advanced stages mostly late blight tuber rot remainder moist type Fusarium and Black leg tuber rots. Less than one half of one percent soft rot apparently following freezing." Federal inspection certificate dated March 12, covering condition on arrival at Galveston, read: "Firm; dry. Dry rots average 6%, range from 4% to 8% in different sacks; mostly Late Blight Tuber Rot. In a few sacks, about 1/2 of 1% advanced wet rot, in some cases following old freezing-injury scattered in sack. An average of 5% are crushed, broken or badly cracked; old damage, and found in end of sack." Neither of the Federal inspections made any reference to loosely filled sacks or apparent shortage in weight.

Ruling included in Decision

It was incumbent upon complainant to establish its case by a fair preponderance of the evidence. Since complainant failed to do so, the complaint was dismissed.

S-1994, Sept. 10, 1938, Docket 2904: (S.P.)

R.H. DIETZ & CO., CHICAGO, ILLINOIS v. ABE GOLDBERG, INC., YOUNGSTOWN, OHIO.

Violation charged: Unjustified rejection of a carload of watermelons.
Principal points involved: A carload of 910 Tom Watson watermelons constituted substantial compliance with contract calling for 28 lb. average; to collect damages because of alleged unjustified rejection seller must prove commodity complied with contract specifications.
Order: Complaint dismissed.

Outline of Facts

On or about June 25, 1937, through a broker, complainants sold to respondent one carload of watermelons to be "28-pound Watsons - Usone Red Cutters" at $275 f.o.b. Complainants thereafter diverted a carload of 910 Tom Watson melons which had been shipped from Quitman, Ga., and tendered the shipment to respondent at Youngstown, Ohio. The melons were rejected by respondent for the alleged reason that the contract specified 28-pound melons, and this shipment consisted of melons which "actually weighed on the average 30 pounds" and that there was a difference in count in the car. Respondent contended that the weight and count were a material part of the contract. They were resold to a Youngstown company at $200 delivered. This purchaser paid the freight of $203.17 and demurrage of $13, or the total sum of $216.17, which was $16.17 more than the agreed resale price, and complainants reimbursed the purchaser for this deficit. Complainants therefore asked for an award of the contract price of $275 plus the deficit of $16.17, or $291.17. An amendment to the complaint subsequently filed alleged that complainant received $14.52 from the carrier and the claim was reduced to $276.65.

Ruling included in Decision

Records on file in the Bureau of Agricultural Economics show that a carload of 28-pound Tom Watson watermelons contains from 900 to 1040 melons. These figures are obtained from reports of Federal inspection made during the past several years and indicate that the shipment here under consideration substantially complied with the contract requirement for 28-pound average Tom Watson watermelons. Complainants failed, however, to submit any proof whatever to show that the watermelons here under consideration were U.S. No. 1, or that they cut red at shipping point as required by the contract upon which this proceeding is based. Under these conditions it was held that complainants failed to prove that the rejection was without reasonable cause, and the complaint was dismissed.

S-1995, Sept. 12, 1938, Docket 2839: (S.P.)

IDAHO PACKING CORPORATION, POCATELLO, IDAHO v. INNESS BROS., INC., KANSAS CITY, MO.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: To prove unjustified rejection of produce, seller must show conclusively that produce met contract specifications.
Order: Complaint dismissed.

Outline of Facts

On or about January 7, 1937, through a broker, complainant sold to respondent one carload of Idaho Russet cull potatoes at $1.95 per bag delivered, or for a total net invoice of $500.40 after deducting freight charges. Shipment was made from Declo, Idaho on or about January 14, and the car was diverted by complainant to respondent at Kansas City, Mo. The potatoes were rejected by respondent upon arrival at Kansas City and the draft drawn on respondent for the contract purchase price was dishonored. Complainant claimed that because of respondent's rejection it was necessary to issue an additional diversion order to another distributor, who sold the shipment to a Joplin, Mo., firm on February 2, for the net invoice price of $284.80, or at a loss to complainant of $200.60, for which an award was asked.

Respondent admitted entering into the contract but contended that the potatoes failed to meet contract specifications in that they were exceedingly small and showed heavy decay of 6 to 8%.

Deposition of the distributor who made final sale to the Joplin firm stated in substance that personal inspection was made of the potatoes which were found to generally run small in size, and in a state of decay, and that owing to the inferior quality and condition they could not be disposed of in Kansas City during the period January 20 to 28; that the Joplin firm complained of the condition and was granted an allowance of 5¢ per bag and that complainant was advised as to the condition. These statements were corroborated by the Joplin purchaser who stated that the potatoes had to be reconditioned, which resulted in a loss of 16 sacks and cost of $20 for reconditioning, and that the allowance of 5¢ per cwt. was insufficient to cover shrinkage and incidental expenses.

Federal-State inspection on January 15 at point of origin showed the size as "generally ranging from 1½ inch up to 4 ounces", "potatoes are mature, firm, fairly clean to slightly dirty showing defects not permissible in any official grade; approximately 2% soft rot.

Ruling included in Decision

Complainant failed to prove conclusively that the potatoes conformed to contract requirements and the complaint was therefore dismissed.

S-1999, Sept. 20, 1938, Docket 2716: (S.P.)

C. F. SCHAEFFER CO., YAKIMA, WASHINGTON v. DeBOIS COMMISSION CO., OKLAHOMA CITY, OKLAHOMA.

Violation charged: Unjustified rejection of a carload of apples.
Principal points involved: Buyer has right to choose with whom he may deal but may waive that right through failure to object immediately upon receipt of memorandum; buyer not relieved of duty through own negligence; loss of profits must be proved.
Order: Complaint dismissed.

Outline of Facts

After an exchange of wires between a broker and complainant on January 27, 28 and 30, 1937, and in conformance with the statements therein made, the broker issued a memorandum of sale setting forth the sale on February 1, of a carload of Orchard-Run Winesap apples, 2½ inches up, mostly 2-5/8 inches up, highly colored, cold storage storage stock, best quality, size not over 15% C grade, sold by complainant to respondent at $60 per ton f.o.b. shipping point. The so-called confirmation of sale issued by complainant on January 30, which, under the circumstances involved in the instant case, must in fact be held to be a memorandum of sale, stated that the apples were sold by complainant for the account of the Marsh Fruit Co. The apples were shipped by the Marsh Fruit Company from Chenaur, Washington, on February 8, to respondent at Oklahoma City, Oklahoma, where they arrived February 15, and were promptly rejected by respondent for the alleged failure to meet contract requirements. Resale by complainant resulted in net proceeds of $586.95, or a claimed loss to complainant of $400.68, to which complainant added the cost of telegrams amounting to $44.94, making a total of $445.62, for the recovery of which this complaint was filed.

Respondent maintained that he did not purchase the apples from the Marsh Fruit Co. but that he agreed to purchase them at a price which he believed to be the top of the market only because of complainant's reputation for the shipment of high grade apples.

Shipping point Federal-State inspection on February 8, showed the grade as Washington Orchard Run Loose, apples mostly firm-ripe, many ripe, less than 1% decay, ranging from 2¼ to 3½ inches in diameter, mostly 2-5/8 to 3 inches, "15% to full red color, about 2/3 of stock showing color for Extra Fancy. Defects of C Grade within tolerances, averaging 12%; about 3/4 of which are punctures. Approximately 10% of stock Extra Fancy quality; 65% Fancy Quality; 10% C Grade quality." Federal inspection at Oklahoma City on February 16, the day of arrival, restricted to condition of the accessible portion, consisting of upper 2½ feet, showed: "Apples mostly ripe, many firm ripe. 1% decay. Average 4% of stock scattered through load and from 10 to 16% next bunkers shows breakdown characteristic of freezing injury, skins being wrinkled or discolored, flesh brown and mealy, with a fermented flavor, and in many instances affected apples next bunkers show large glassy bruises extending to the core."

Rulings included in Decision

1. The record clearly disclosed that the original contract was between complainant and respondent, while the apples were in fact shipped by the Marsh Fruit Co., in whose favor the draft covering the contract purchase price was drawn on respondent. The record did not show definitely at what time respondent was notified of the true owner and shipper of the apples, but it was apparent, and considerable testimony was included in the record to show, that he believed that he had purchased a carload of apples from complainant upon whose reputation he relied to secure a carload of high grade apples. It is conceded that a buyer has a right for any reason, or for no reason at all, to choose those with whom he will deal, but a serious question is raised in this transaction with reference to whether the respondent did not waive this right to deal only with the complainant through his failure to object immediately upon receipt of the memorandum from the complainant showing that shipment was to be made by the Marsh Fruit Co., which memorandum complainant claimed to have mailed on or about January 30, 1937. The presumption was that the respondent received it promptly. In fact, respondent admitted having received it, but contended that he did not notice that shipment would be made by someone other than the complainant. This was undoubtedly true, but respondent could not be relieved through his own negligence, of

his duty to object to shipment by the Marsh Fruit Co. In failing to object promptly, he must be held to have waived his right in this respect, and to have consented to shipment being made by the Marsh Fruit Co., which company assigned its interest in this proceeding to the complainant.

2. The item of cost of telegrams should be disregarded since there was no itemized statement of the cost of sending any of the wires.

3. The contract of sale specified an f.o.b. sale of highly colored, Orchard-Run Winesap apples, best quality, cold storage stock. The certificate of inspection made at shipping point, to which reference has been made, indicated that approximately two-thirds of the shipment showed sufficient color for the Extra Fancy grade. A review of the official records of Federal-State shipping point inspection of the 1936 crop of bulk-Orchard-Run, Winesap apples at Yakima, Washington, showed that the shipment here under consideration was of the common run for the season and was not "highly colored" or "best quality" for the season. It was therefore evident that the shipment here under consideration failed to meet f.o.b.contract requirements at the time and place of shipment and the complaint was dismissed.

4. The counter complaint was dismissed since the damages claimed to have been sustained by respondent were purely speculative and entirely unsupported by proof that sales had been made or could have been made by him at a price such as would have permitted him to realize the profit which he set forth as a basis for his alleged loss.

S-2013, Sept. 29, 1938, Docket 3015: (S.P.)

TOM-A-TOE PRODUCE CO., ATLANTA, GA. v. HEINTZ-GRASS & CO., HAYWARD, CALIF.

Violation charged: Failure to deliver a carload of tomatoes in compliance with contract.
Principal point involved: Claim for damages based on cost of replacement six days after justified rejection must be supported by showing of market price to prove damages not caused by increase in market price.
Order: Complaint dismissed.

Outline of Facts

On or about September 15, 1937, through a broker, complainants purchased from respondents a carload of U.S. No. 1 tomatoes at 75¢ per lug, f.o.b. shipping point, to arrive "U.S. No. 1 mature green" Atlanta, Ga. The tomatoes were shipped from California on September 28 and upon arrival at Atlanta were inspected by a Federal inspector on October 6, who found that they were approximately 70% U.S. No. 1. Since the shipment did not comply with the contract, complainants refused to accept it and ordered another car on October 12, f.o.b. Oxnard, Calif., at $1 per lug, or a total of $600.

A copy of the complaint was served upon the respondents but no answer was filed by them.

Ruling included in Decision

Complainants did not show the exact time that the car of tomatoes here involved arrived, but the inspection certificate was dated October 6, 1937 at 8:30 a.m. Complainants did not purchase another car until October 12, and in view of the delay of six days or more it was incumbent on them to show that the damages claimed were not due to increase in the price of tomatoes, but they failed to show the market price and therefore it could not be determined from the record whether the difference between the original contract price and the price on October 12 was or was not due to increase in the market price. Since complainants failed to establish what, if any, damages were sustained by the breach of the contract the complaint was dismissed.

S-2019, October 1, 1938, Docket 2855: (S.P.)

V. FAMULARO AND SONS, DENVER, COLORADO v. REEDLEY GRAPE GROWERS, INC., REEDLEY, CALIF.

Violation charged: Failure to deliver a carload of grapes in compliance with contract.

Principal points involved: Payment by carrier of claim for damage in transit indicated that shipment was roughly handled; no way to tell how much of damage claimed was caused by rough handling.

Order: Complaint dismissed.

Outline of Facts

On or about August 27, 1937, through a broker, complainant purchased from respondent one carload of mixed varieties of grapes at prices ranging from 55¢ to 90¢ per lug, or crate, depending on the variety and package, or for a total of $608.60, f.o.b. Reedley, Calif., "Quality to be like last car", which referred to a carload of mixed varieties of grapes which, although not so specified in the confirmation of sale, were admittedly of U.S. No. 1 quality when shipped. The record failed to contain any proof as to the kind, quality or grade of the grapes contained in said "last car" upon arrival at destination. On or about August 28, respondent shipped a carload of 854 lugs, or crates, of mixed varieties which then were of U.S. No. 1 quality, from Reedley, California to Denver, Colorado. Complainant contended the grapes were not in suitable shipping condition and on that ground sought an award of damages.

Restricted Federal inspection at destination, apparently made on the date of arrival, showed that at least a considerable portion of the Seedless, Ribier and Red Malaga varieties in the shipment failed to grade U.S. No. 1 Table, because of decay ranging from an average of 2% to 8%, and split, crushed or shattered berries in the varieties inspected.

Ruling included in Decision

Complainant contended that the destination inspection showed that the grapes were not in suitable shipping condition at time and place of shipment, but he showed that the carrier paid $100.40 to reimburse him for damage in transit, thus indicating quite conclusively that the shipment was roughly handled in transit, and there was no way of telling how much of the damage complained of might have been occasioned in this manner. It was also observed that complainant included a loss suffered in the handling of the White Malagas and the Cornichons in his claim for damages, although the record disclosed that the White Malagas were graded U.S. No. 1 Table at destination, the same as at shipping point, and the Cornichons were not included in the destination inspection. However, while no grade was specified in the so-called confirmation of sale covering the "last car", the grapes when shipped were admittedly of U.S. No. 1 quality. Likewise, the record showed that the shipment here in controversy was of U.S. No. 1 quality at shipping point and since the contract of sale specified f.o.b. shipping point, the shipment consisted of grapes which were "like last car" in quality and therefore met contract requirements. The complaint was therefore dismissed.

S-2020, September 30, 1938, Docket 2733: (Hearing)

CARL RASMUSSEN, CARIBOU, MAINE v. SOUTHERN STATES COOPERATIVE, RICHMOND, VA.

Violation charged: Unjustified rejection of a carload of seed potatoes.
Principal point involved: Memorandum of sale is proof of sale only when shown that the broker was authorized by the parties to issue it and that it was received and accepted by the parties without objection.
Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on or about February 8, 1937, he sold two carloads of certified Cobbler potatoes to respondent "through sources authorized by respondent" at a delivered price of $4.45 per 10-peck bag. Respondent consistently maintained that it had not purchased potatoes at that price and therefore refused to accept the shipments, which for this reason were not tendered to it by complainant but were resold at a claimed net loss of $503.99, for which an award was asked.

The record showed that early in February the Eastern Grain Growers, of Hagerstown, Md., contacted respondent's district manager on one or more occasions in an attempt to sell seed potatoes to respondent, but did not show what was said by the parties. On February 12, Eastern Grain Growers wired him: BOOKING FIVE HUNDRED BAGS ONE CERTIFIED COBBLERS FOUR FORTY-FIVE DELIVERED WINCHESTER RATE THANKS. Respondent's district manager admitted receiving this telegram but contended that he immediately replied: "I could not use them at $4.45, but would take them at $4.40 shipping to Westminster and Winchester," although he testified he did not keep a copy of the letter and the original was not placed in the record. On the same day that the above-mentioned wire was sent Eastern Grain Growers made out a memorandum in triplicate, specifying the sale for A.B. Cohen Co. at Fort Fairfield, Maine, to respondent of Bel Air, Md., of 500 10-peck bags of No. 1 Maine Cobbler potatoes at $4.45 per bag, to be delivered on a 65½¢ freight rate. Eastern Grain Growers contended that a copy of this memorandum of sale was promptly mailed to respondent's district manager, but he claimed he never received it.

Ruling included in Decision

Under the situation, as previously set forth, the memorandum of sale was the only evidence of any agreement which may have been entered into by the parties. Such a memorandum would be accepted as sufficient proof of a sale only when shown that the broker was authorized by the parties to issue the memorandum and that the memorandum was received and accepted by the parties without objection. Either Eastern Grain Growers or its president purchased the potatoes and then attempted to sell them to respondent. There was no definite showing that either Eastern Grain Growers or its president had at any time previously acted as broker, or agent, for respondent. Under these conditions it was clear that neither could be considered to have acted as a broker in the transaction here under consideration as alleged by complainant. Moreover, there was no positive proof that the memorandum issued was actually delivered to respondent. The complaint was therefore dismissed.

S-2028, October 11, 1938, Docket 2972: (S.P.)

H.G.TIMM PRODUCE CO., HALLETTSVILLE, TEXAS v. S.M.YOUNG, PITTSBURGH, PA.

Violation charged: Failure truly and correctly to account for two carloads of tomatoes sold for complainant's account.
Principal points involved: Seller cannot hold agent responsible for deduction by buyer to which agent did not agree; naming of a rate for lesser service in 1934 did not bind agent to that rate in sale of two carloads of produce in 1937.
Order: Complaint dismissed.

Outline of Facts

In the month of May, 1937, complainant consigned to respondent in interstate commerce, for sale on the Pittsburgh, Pa., market, two carloads of tomatoes. Respondent negotiated sales of the tomatoes to purchasers at Pittsburgh and received from them the agreed sale price and thereafter paid the freight on the shipments and remitted to complainant the net sums due after deducting a selling charge of 5% of the gross sale price on each car. Complainant contended that in April, 1934, respondent stated to complainant that "on arrival sales and f.o.b. sales" his charge was 5¢ per lug and that complainant had no subsequent notice of any change in respondent's selling charge rate, and that the rate charged was excessive and should have been 5¢ per lug.

Respondent stated that 5¢ per lug selling charge was not applicable to these two cars because he furnished additional services, consisting of special reports made to complainant concerning the Pittsburgh market, and because complainant was furnished an "accommodation advance" of funds, and that when such services are furnished in addition to the mere negotiation of sale, a charge of 5% on the gross sale is reasonable and is the usual charge for such services on the Pittsburgh market. This claim was corroborated by another broker on that market.

In connection with this transaction it was stated that in remitting to respondent for one of the cars the purchaser arbitrarily deducted $162.50, the alleged amount of its loss of profits on a previous car which complainant unlawfully diverted following the purchase thereof through respondent as agent for complainant. Complainant contended that respondent had no authority to sell that car and he therefore had the right to make the diversion.

Rulings included in Decision

1. Whether the shipment previous to the two covered by this transaction was wrongfully or properly diverted was immaterial. The controlling point was that respondent acted as complainant's agent and forwarded to complainant the full amount received as such agent, less the sum previously advanced and a five per cent selling charge. It appeared that respondent did not consent to the deduction by the purchaser, and as such selling agent he did not guarantee payment by the purchaser. Under these circumstances, complainant's cause of action should have been instituted against that purchaser, rather than against respondent.

2. As respondent's naming of a rate of 5¢ per lug in 1934 was for a lesser service, it was concluded that no contractual obligation rested upon him to apply the same rate in connection with the sale of the two lots in question. The evidence failed to show that the selling charge of five per cent on the gross sale price was in violation of any contract agreement or was excessive and unusual for the services rendered. The complaint was dismissed.

S-2035, October 14, 1938, Docket 2864: (S.P.)

PIOWATY BROS., INC., CHICAGO, ILL. v. ABE GOLDBERG, INC., YOUNGSTOWN, OHIO.

Violation charged: Unjustified rejection of a carload of lettuce.
Principal points involved: Agent is bound to perform as instructed by his principal; allegations of complainant must be proved by preponderance of evidence.
Order: Complaint dismissed.

Outline of Facts

On or about September 22, 1937, complainant and respondent conducted oral negotiations over a telephone for the purchase of one carload of lettuce, which was to be shipped from Chicago, Illinois to Youngstown, Ohio. Complainant claimed that in accordance with the agreement a carload was purchased for the account of respondent at $2.25 per crate on track Chicago, plus brokerage, making the total invoice price $382.67, and was shipped to respondent, but that respondent refused to take delivery and in reselling complainant suffered a loss of $269.90, the difference between the amount complainant paid for the produce and the amount received from resale.

Respondent contended that complainant was to purchase a car of extra fine lettuce and that the contents of the car tendered were not of the quality agreed upon.

Complainant maintained that the purchase was to be one of the better carloads of lettuce then on track and that nothing was said about quality, and that when a broker acts in good faith in making a purchase for his principal that is all he is required to do and the principal is bound to accept and pay for the merchandise so purchased.

Rulings included in Decision

1. The several citations cited by complainant in support of the position that the principal is bound to accept merchandise purchased by the broker, acting in good faith, were not controlling in this case for the reason that they are applicable to cases where the broker, acting as agent for one party, buys produce from another party who subsequently files a claim. In the instant case, no third party appeared and the action was wholly between principal and agent. As between principal and agent, the agent is bound to perform as instructed by his principal.

2. Complainant, who was seeking to change existing legal relationships, had the burden of proving the material allegations of the complaint by a preponderance of the evidence. In this proceeding the agent, complainant, alleged it was instructed to buy a carload of lettuce, described as one of the better cars on track, whereas the respondent, the principal, alleged that the agent was instructed to buy lettuce of extra fine quality. Consequently, the essential points in this proceeding, when summarized, were the respective claims of the parties. It was admitted that the alleged agreement between the parties was not reduced to writing. The evidence was sharply conflicting and the facts were still in a state of equilibrium. Complainant having failed to sustain the burden of proof, the complaint was dismissed.

S-2040, October 18, 1938, Docket 3002: (S.P.)

COONEY & KORSHAK, CHICAGO, ILLINOIS v. K. H. McDAVITT, TWIN FALLS, IDAHO.

Violation charged: Failure to deliver a carload of onions in compliance with contract.
Principal point involved: Claim of buyer of outlay in resale of produce because of short weight must be supported by proof of payment by him.
Order: Complaint dismissed.

Outline of Facts

On or about December 28, 1937, respondent sold and contracted to deliver to complainants one carload of U.S. No. 1 Idaho yellow onions, in fifty-pound sacks, at $1.80 per cwt. loaded on car. The shipment moved from loading point at Twin Falls, Idaho, to complainants at Omaha, Nebraska. Complainants claimed that the onions were sold to a dealer in New York City who was stopped from selling them by the Corporation Counsel of that city due to the packages being short weight, and that a fine of $25 was imposed against the dealer for violation of a municipal ordinance; that the dealer in repacking to make the required legal weights as stenciled on the sacks lost or used up 60 sacks or a total of 3,000 pounds; that complainants, because of short-weight packages, were required to repay the New York dealer $121 (60 sacks at $1.60 per sack and the $25 fine assessed for weight violation). Attached to the complaint as exhibits were a receipt from Corporation Counsel of New York City for $25 issued to the New York firm for payment of the penalty for short-weight violation, an affidavit from

the New York purchaser stating that affiant was required to pay a fine to the New York City authorities for short-weight violation and that he used 60 sacks to refill the sacks alleged to be short in weight and a bill from the New York purchaser to complainants for $121. Respondent denied liability as an independent shipper claiming that he was a broker acting as complainants' agent and that he received no notice of violation until about 14 days after shipment arrived in New York City.

Ruling included in Decision

The complaint in this case was dismissed as nowhere in the record was it shown that complainants suffered the loss alleged in the complaint. They alleged that they paid the New York buyer the sum of $121 but this allegation was not supported by any evidence in the record. In view of this fact it was not necessary to discuss the other allegations of the complaint and answer.

S-2041, October 18, 1938, Docket 2995: (S.P.)

MINNECI FRUIT CO., PITTSBURGH, PA. v. HINES & CO., SALT LAKE CITY, UTAH.

Violation charged: Failure to deliver a carload of celery in accordance with contract.

Principal points involved: Buyer's failure to confirm seller's counter-offer with modification as to "quality, pack" did not invalidate contract as to size of crates; replacement of Utah celery by purchase of California celery, which sold at destination market at 50 to 75¢ per crate higher than Utah celery, not basis for computation measure damages; since 20 inch and 22 inch replacement crates cost the same, buyer failed show damage because of delivery of 20 inch crates instead of 22 inch ones.

Order: Complaint dismissed.

Outline of Facts

On November 18, 1937, the broker in this case wired respondent to quote a delivered price on a rolling car of celery. Respondent quoted a price delivered Pittsburgh, Pa., for a car shipped from American Fork, Utah, on November 16, and described the crates as "California style ½'s, 22 inch." The broker answered, directing respondent to "divert" the car described to complainant at $2.10 per crate delivered "if tight pack, full length tops extending well above crates, tops fresh and green, individually washed and stripped." Respondent answered that it was "booking Minneci *** $2.10 delivered, same quality, pack, car Lafbury handling." The broker then issued a standard confirmation of sale describing the celery as "approximately 340 California style 22 inch half crates, 2½ dozen average, quality and pack same as" previous car. The shipment arrived at Pittsburgh November 22 and was rejected by complainant on the ground that the crates were 20 inch instead of 22 inch. On November 23, complainant purchased a carload of California celery to replace the shipment which respondent failed to furnish, at a cost of $559.23 delivered Pittsburgh, and claimed a loss of $187.

Respondent contended that the wires exchanged between respondent and the broker, who represented complainant, did not establish a completed contract in that complainant did not accept respondent's offer of $2.10 per crate delivered, "same quality, pack, car Lafbury handling" and the broker had "no authority to make any confirmation of sale except upon the last offer"; and that even if a contract was entered into it "was immaterial whether the celery was furnished in 20-inch or 22-inch crates", the only difference between the two being the depth, and that shipping point inspection certificate showing the stalks to be "20 to 24 inches, mostly 22 to 24 inches", established a substantial compliance with contract specifications.

Federal shipping point inspector certified that the length of the stalks ranged "from 20 to 24 inches, mostly 22 to 24 inches. Less than 5% under 20 inches". An appeal inspection, made at Pittsburgh on November 23, reversed the shipping point certificate "only as to size of crates."

Rulings included in Decision

1. Respondent's modified counter-offer was only a modification as to "quality, pack" and retained the former representation as to 22 inch size of crates. The broker's Confirmation of Sale correctly stated the agreement of the parties.

2. The shipping point inspector made no specific finding as to the size of the crates and the appeal inspection certificate was equally lacking in definiteness. The implication was, however, that there was neither an actual nor a substantial compliance with the requirement that the celery was to be packed in 22-inch crates.

3. The proof failed to support complainant's claim of loss. The invoice covering the replacement carload of celery showed that complainant made a repurchase of 111 20-inch crates containing celery ranging from 3½ to 5½ dozen size and 267 22-inch crates containing celery ranging from 2 to 5 dozen size, of which but 23 crates contained celery of a size smaller than 3 dozen. It showed that complainant paid the same price for celery packed in 22-inch crates as was paid for celery packed in 20 inch crates. One of respondent's exhibits showed that California celery of the sizes purchased jobbed on the Pittsburgh market at a price from 50 to 75¢ per crate more than Utah celery of the sizes specified in the original purchase. The effect of the evidence on this phase of the case, therefore, was that complainant did not replace the original purchase by celery of the same kind, length of stalks, and size of crates as specified in the original contract, and since there was no difference in price between celery packed in 20 and in 22-inch crates, complainant suffered no loss on account of the specific breach of warranty which was assigned as a reason for complainant's failure to accept the original shipment and as a basis for the recovery of damages for breach of contract. The complaint was dismissed.

S-2042, October 14, 1938, Docket 3016: (S.P.)

SAMUEL H. BIGLER, PITTSBURGH, PA. v. ALFRED BROBACK & CO., MINNEAPOLIS, MINN.

Violation charged: Failure to deliver a carload of onions in accordance with contract.

Principal points involved: In sale of onions, reversal of shipping point inspection as to size at destination does not make shipper liable for failure to deliver without reasonable cause; 24 hour rule applies to time within which justified rejection must be made and does not operate to defeat buyer's cause of action if he is otherwise entitled to recover.

Order: Complaint dismissed.

Outline of Facts

In October, 1937, through a broker, complainant purchased from respondent one carload of U.S. No. 1 Yellow Onions, warranted as 1½" minimum diameter, 60-70 per cent 2" and larger in diameter, at $1.10 per 50-pound bag, delivered at Pittsburgh, Pa. Shipment was made from Minnesota, where a Federal-State inspector certified the size of the onions as "None under 1½", ranging up to 2 3/4", mostly 1 3/4 to 2 1/4" in diameter. Ranging in most samples from 60 per cent to 80 per cent, in many from 45 per cent to 55 per cent 2" and larger." The shipping point inspection certificate was reversed "as to size" by an appeal certificate based upon inspection of the load made at Pittsburgh November 5, 1937. The appeal certificate stated that "Stock fails to grade U.S. No. 1, 60 per cent by weight 2" and larger, on account of undersize and on account of more than 15 per cent under the average for stock 2" and larger."

Respondent argued that because complainant did not reject the shipment or call for an appeal inspection within 24 hours he "has no grounds for cause of action."

Ruling included in Decision

1. The 24-hour rule applies to the time within which a justified rejection must be made. In the instant case complainant accepted the shipment. The 24-hour rule does not operate so as to defeat complainant's cause of action if he is otherwise entitled to recover.

2. Complainant's cause of action rested upon the effect of the appeal inspection which reversed the shipping point inspection as to size. But it has been consistently and properly held in prior cases that where a sale is made on the basis of a loading point Federal inspection, and it is not shown that the seller had any independent knowledge that the loading point inspection certificate was incorrect as to the facts found by the inspection and certified to in the inspection certificate, the seller cannot be held liable in damages for failure to deliver without reasonable cause within the intent and meaning of section 2, paragraph 2 of the act. The act provides that failure to deliver must be "without reasonable cause." This principle is applicable whether the sale be f.o.b. or delivered. Respondent secured the shipping point Federal inspection on October 20 and the sale was completed October 22. The inspector found that "none" of the onions were under 1½". There was nothing to indicate that respondent had any knowledge as to the size of the onions other than was shown by such inspection certificate.

Respondent also knew that the size of the onions would not change as a result of movement in transit from loading point to destination. It, therefore seemed clear that in stating that the minimum size of the onions was 1½" respondent acted as an honest and prudent man would act under like circumstances. The reversal of the shipping point inspection certificate as to minimum size of the onions in no way affected respondent's honesty in the transaction. Here the evidence showed only a breach of contract but recovery under the statute requires complainant not only to establish a breach of warranty but a breach of warranty "without reasonable cause." The complaint was therefore dismissed.

Complainant's petition for reconsideration was overruled and denied by order dated January 14, 1939.

S-2043, October 18, 1938, Docket 2745: (S.P.)

RANDOLPH MARKETING CO., INC., LOS ANGELES, CALIF. v. THE S. LANDOW FRUIT & PRODUCE CO., NEW HAVEN, CONN.

Violation charged: Unjustified rejection of a carload of cauliflower
Principal points involved: California cauliflower not in suitable shipping condition when shows at destination average 20% decay. Bacterial Soft Rot and Gray Mold Rot, affecting large portion of heads; burden on complainant to prove contention that transportation service and conditions were abnormal.
Order: Complaint dismissed.

Outline of Facts

On or about February 5, 1937, complainant sold to respondent one carload of U.S. No. 1 cauliflower, Blue Goose brand, at $1.10 per crate f.o.b. California loading point "top ice extra." Complainant shipped 480 crates of celery from Santa Maria, Calif., which arrived at New Haven, Conn., February 16, where the celery was refused by respondent for the alleged reason that the decay indicated the cauliflower was not in suitable shipping condition at time of shipment.

Federal inspection at shipping point on February 6, showed the cauliflower graded U.S. No. 1, that the "jackets" were "fresh, green, and well trimmed" and that there was "less than 1% decay on jackets." Federal inspection upon arrival at New Haven showed the quality of the cauliflower to be "clean, well trimmed, defects of U.S. No. 1 grade within the tolerance", and that the condition of the load was: "Jacket leaves mostly slightly wilted, generally green, heads generally compact and mostly creamy white to white, averaging 8% heads slightly yellow. Decay ranges generally from 1 head in some crates to 4 heads in others, averaging approximately 20% for the lot; decay is both Bacterial soft rot and gray mold rot about 1/3 in advanced stages affecting 1/2 to entire head, and 2/3 in early stages affecting one inch or more of the surface of heads." Complainant had 15,000 pounds of top ice placed in the car and the New Haven inspector certified that there was at the time of his inspection a "small amount of crushed ice between the rows of crates" up to the third layer of crates, from the bottom, the load being 7 crates high.

Complainant argued that the railroad equipment was defective and called attention to the finding of the inspector for the Binney Inspection Service, Inc. at Boston, Massachusetts on February 19: "Left doors at bottom intersection poorly fitting and leaky allowing considerable light to pass through aperture. Water dripping and icicles hanging from floor evidence of faulty insulation."

Ruling included in Decision

The extent of decay shown by Federal inspection made at New Haven made it clear that the cauliflower was not in suitable shipping condition if the shipment was "handled under normal transportation service and conditions." Complainant, having contended that the service or conditions were abnormal, must sustain the burden of proving its contention. The Boston inspection was made 3 days after the car reached New Haven, at which point neither the Federal inspector nor the respondent noted any fault in the equipment, nor did the Federal-State inspection certificate issued at loading point show faulty car equipment. The record did not show there were openings at the car doors during transit or at time of arrival of the car at New Haven. Further, had the faulty equipment existed during the transit period it was not shown and it was not believed the fault would have caused the melting of the ice or the abnormal development of decay, as the fault in the equipment was comparatively slight and the shipment traveled under the rather low external temperatures of from 10° to 61°, the average between the daily minimum and maximum temperatures for the period being approximately 41°. The Federal inspection at New Haven showed

temperatures of the produce of 38° and 36° and the Boston inspection, which apparently covered the entire shipment, showed temperatures of 38° and 35° and further that the jacket leaves had a good green color. Bacterial Soft Rot and Gray Mold Rot, the decays reported at New Haven, may develop in produce under normal temperatures and the conclusion seemed warranted that the abnormal amount of decay at New Haven should not be attributed to faulty car equipment but to a lack of suitable shipping condition at the time of shipment. Respondent's rejection of the produce was therefore not without reasonable cause and the complaint was dismissed.

S-2044, October 18, 1938, Docket 2924: (S.P.)

STARR PRODUCE CO., INC., PHILADELPHIA, PA. v. CRAWFORD PRODUCE CO., INC., SAN BENITO, TEXAS.

Violation charged: Failure to deliver a carload of vegetables in accordance with contract.

Principal points involved: Buyer liable for purchase price of goods accepted; buyer had right to examine goods before paying therefor; allegation unsupported by evidence to explain apparently altered contract.

Order: Complaint dismissed: counter-complaint dismissed.

Outline of Facts

On or about March 5, 1937, respondent sold to complainant 200 half crates of cabbage at $1.35 per crate; 150 crates of curley green parsley at $1.10 per crate; 25 broccoli (24's) at $2.75 per crate; and 240 three dozen size beets at $1.05 per crate, or for a total of $755.75. The sale was negotiated by a broker who acted as agent for both parties and the sale was on a delivered basis, as shown by the broker's standard memorandum of sale furnished to both parties. Shipment was made from San Benito, Texas, to complainant at Philadelphia, Pa. Complainant alleged that when the shipment arrived at Philadelphia, about March 12, it was required to and did pay for the shipment before making an examination of the same; that on account of the poor condition of the cabbage and beets, it sustained a loss of $153.65, the difference between the fair and reasonable market value of the cabbage and beets on March 12 if they had arrived in good condition, and the value on the same date in the condition

in which they arrived. Attached to the complaint was what was alleged to be a true and correct copy of the broker's standard memorandum of sale which was similar to that of the respondent, except that the following typed words appeared thereon immediately under the description of the items:

"(written in)
N.B.: all above
commodities U.S.
#1 Grade
(sgd.) Louis J. Maid
March 9, 1937"

Complainant, after making payment for the shipment, proceeded to institute an action for garnishment of the money paid for the draft, thereby causing respondent to go to the expense of employing attorneys in San Benito and Philadelphia to defend its interests. Thereafter, complainant withdrew the action when it was found that the funds attached were the property of a local bank, respondent having sold the draft to the bank. Respondent filed a cross-action for $123, covering legal expenses incurred in connection with the garnishment proceeding.

Rulings included in Decision

1. Complainant said, in its opening statement of facts, "Attached hereto, made a part hereof, and offered in evidence by complainant, is the original standard contract of sale, which bears the warranty of respondent's agent that 'all above commodities U.S. 1 Grade'". However, it failed to produce the memorandum on which that statement was alleged to be written. The contract was made on a delivered basis, and complainant had the right to examine the commodities before making payment therefor. Under the contract, based upon the evidence presented, it bargained for, received, and paid for, commodities not required to be U.S. No. 1 grade. The complaint was therefore dismissed.

2. The act makes no provision for allowing claims of the nature of respondent's and the countercomplaint was therefore dismissed.

Petition for Reconsideration

Complainant filed a petition for reconsideration of the Secretary's order of October 18, 1938, dismissing this complaint, and attached to it the original of the broker's standard memorandum of sale on which was written in ink by the broker "N.B. All above commodities U.S. No. 1 grade. Louis J. Maid, March 9, 1937." The petition stated that it was not annexed to the opening statement of facts through inadvertence and charged that the Secretary had been derelict in his duty in that he "at no time prior to the making of said order notified the complainant of its failure to annex to the opening statement the original standard memorandum of sale."

The Secretary, in his supplemental order dated December 29, 1938, said: "The respondent's answer in this case denied that the memorandum of sale stated that the commodities were to be U.S. No. 1 grade, and attached thereto, as an exhibit, was the seller's carbon copy of the memorandum of sale which made no mention of U.S. No. 1 grade. Telegrams exchanged between the respondent and the broker also made no mention of the grade. The respondent's answer, supported by the seller's copy of the broker's memorandum of sale, which denied that U.S. No. 1 Grade was sold, served to put the complainant on notice that an explanation would be required of the fact that the buyer's copy of the broker's memorandum, dated March 8, 1937, bore the additional longhand notation, dated March 9, 1937, that all commodities were to be U.S. No. 1 Grade. The complainant relies on the broker's notation to establish its case, but made no effort to produce the broker to explain the apparently altered contract." In view of complainant's failure to prove the allegations of the complaint and to comply with regulation 5, section 4, paragraph 3, and submit material evidence which was not available to petitioner prior to the hearing, the petition for reconsideration was overruled and denied.

S-2063, October 20, 1938, Docket 2942: (S.P.)

M.W. MILLER & CO., STURGEON BAY, WISCONSIN v. A.L. SHAFTON & CO., STEVENS POINT, WISCONSIN.

Violation charged: Unjustified rejection of a carload of peaches.
Principal points involved: Failure of produce to meet contract specifications made unnecessary consideration of other questions raised.
Order: Complaint dismissed.

Outline of Facts

On or about August 30, 1937, following a telephone conversation between the parties, during which complainant claimed a contract was entered into for the sale to respondents of a carload of peaches to be U.S. No. 1, 2 inches up, at $1.30 per bushel f.o.b. shipping point, complainant diverted a car of peaches from Chicago, Illinois to respondents at Stevens Point, Wisconsin. On the same day respondents wired complainant to cancel the order since they could not use the peaches, but complainant, having ordered the shipment to be diverted, at 11:16 a.m. on August 30, thereafter failed to file further instructions with the carriers until after receiving notice from the delivering carrier at 2:20 p.m. on September 1, of respondents' refusal to accept. Prompt diversion was then made to Minneapolis, Minn., where the peaches were sold for net proceeds of $164.75, or an amount $350.05 less than the total invoice price of $514.80 for the 396 bushels contained in the shipment.

Respondents denied the existence of a contract of purchase and sale and alleged, in effect, that if a contract did exist complainant failed to minimize the damage by making no attempt to hold the car at Chicago after receiving notice of respondents' refusal to accept it on arrival.

Ruling included in Decision

It became unnecessary to give consideration to the evidence as to the existence or nonexistence of a valid and binding contract of sale, or to respondents' contentions with respect to complainant's failure to minimize the damages, since it appeared that the shipment of peaches in question did not meet the specifications of the contract of sale as set out by the complainant. Federal-State inspection of the car at Walnut Hill, Illinois on August 26, 1937, showed that the peaches contained an average of 24% defects of the U.S. No. 1 grade, which was considerably in excess of the tolerance permitted. Copies of the inspection certificate were furnished to complainant and respondents. Since the tender of the shipment by complainant was not in accordance with the terms of the contract upon which its claim was based, the complaint was dismissed.

S-2064, October 20, 1938, Docket 2993: (S.P.)

THE S. A. GERRARD CO., CINCINNATI, OHIO v. H. GLICK & CO., INDIANAPOLIS, INDIANA.

Violation charged: Failure truly and correctly to account for a carload of plums.
Principal point involved: Basis on which an allowance was granted.
Order: Complaint dismissed.

Outline of Facts

On or about June 20, 1937, complainant shipped from Reedley, California, a carload of 1005 lugs of Santa Rosa, Formosa, and Climax plums, billed to itself at Montreal, Ontario, Canada. On or about June 26, while the shipment was in transit, complainant sold the shipment to respondents at $1.75 per crate for 380 crates of Santa Rosa, $1.50 per crate for 504 crates of Formosa and 121 crates of Climax plums, or for a total of $1,602.50, less transportation charges which were estimated at $511.52 subject to correction upon receipt of the paid freight bill. Complainant made diversion to respondents at Indianapolis, Indiana, and drew a draft on respondents for the net contract purchase price of $1090.98, who refused to accept the plums at the contract price on arrival at destination because of alleged failure to meet contract requirements. By subsequent agreement respondents accepted at a reduction of 25¢ per crate, or $251.25, and remitted $839.73 to complainant, who accepted the remittance but filed this complaint upon the ground that allowance was granted subject to a showing by respondents that the fruit was damaged in transit to the extent of such allowance. Complainant claimed to have filed with the carrier a claim for the amount of the allowance granted and to have been advised that the claim would be paid on not to exceed 40 lugs or crates, in the sum of approximately $20, and therefore contended respondents failed to establish their loss, if any in fact was actually sustained. Complainant therefore asked for an award of $251.25.

Respondents claimed that the remittance of $839.73 was in full payment for the plums but admitted agreeing to furnish complainant "the necessary notations from the railroad for filing a claim on account of the condition of the shipment", and it appeared that they did furnish complainant with such information.

Ruling included in Decision

The record failed to support complainant's contention that the plums were accepted by respondents at contract price, subject to such reduction as could be shown to have been actually sustained. It disclosed that the shipment had been somewhat damaged in transit but did not show that it was damaged to the extent of 25¢ per crate. There was no positive showing, however, that respondents misrepresented the condition of the shipment at the time it was refused under the original agreement. Complainant at that time could have refused to grant any allowance whatever and recover for such damage as it could have shown to be sustained if the rejection was without reasonable cause, but it elected to deliver the shipment to respondents with the understanding that an allowance would be granted. A memorandum addressed to the CCC & St. L.R.R., dated June 20, 1937, stating that an "allowance account transit damage, $251.25" was granted respondents in connection with this shipment (placed in the record by complainant) supported respondents' contention that the allowance in that amount was granted to induce respondents to accept this shipment. Respondents' contended that complainant's telegram of June 28: IN ADDITION TO BREAKAGE BE SURE SECURE NOTATION SHOWING PERCENTAGE BRUISED OTHERWISE SOUND PACKAGES IF SUCH CONDITION EXISTS VALUE OF CLAIM WHOLLY DEPENDENT UPON ENTIRE NOTATION was understood to mean that claimant wanted this notation only in support of its claim to be filed with the carrier, and that seemed to be a reasonable construction of the wire. The record did show that on receipt of inspection report from the Railroad Perishable Inspection Agency complainant discovered that the plums were not damaged to the extent of 25¢ per crate and made an attempt to get respondents to remit the full amount of the original contract price and collect for such damage as may have been actually sustained from the carrier, but in reply respondents denied guaranteeing that the breakage would be 25¢ per crate and maintained that the allowance was based on the fact that the fruit generally was ordinary and on the broken condition of the crates. The complaint was therefore dismissed.

S-2068, October 27, 1938, Docket 3078: (S.P.)

FRESH FOODS, INC., CHICAGO, ILL. v. E.H. DOYLE, CARIBOU, MAINE.

Violation charged: Failure to pay brokerage in sale of a carload of potatoes.
Principal point involved: Broker not entitled to fee when seller made obvious error in quoting sales price and immediately afterward notified broker of such error and refused to fill order obtained by broker at first figure quoted.
Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on October 16, 1937, complainant negotiated for respondent the sale of one carload of potatoes to be shipped from Maine to a Chicago firm for the price and on the terms stipulated by respondent, and that respondent failed to pay complainant the sum of $15 alleged to be due as the agreed value of complainant's services.

This case involved the same transaction that was the basis of the complaint in Docket 3077, A. Huizinga & Sons against this respondent. The facts in that case were that on October 16, complainant obtained from respondent a quotation of $1.26 per cwt. for a carload of U.S. No. 1, Size A, Green Mountain potatoes to be shipped from Maine to A. Huizinga & Sons at Chicago, Ill. Immediately after receiving respondent's offer and before quoting it to A. Huizinga & Sons, complainant received an offer of $1.55 from a dealer at Ft. Fairfield, Maine, which is in the vicinity of Caribou. Respondent promptly notified complainant that respondent had used the wrong code word and that the price was $1.53 per cwt. instead of $1.26. Complainant obtained an acceptance of respondent's offer from A. Huizinga & Sons, but respondent refused to ship to that firm and refused to pay Fresh Foods, Inc. the brokerage fee demanded.

Respondent filed no formal answer to the complaint of Fresh Foods, Inc., but a letter addressed to the Bureau on January 17, 1938, read: "I felt then as I do now that nobody in the potato business could help but know that it was an error on my part and to be fair would not try to take advantage of such a situation but this is exactly what happened."

Ruling included in Decision

The alleged brokerage was not earned by complainant and the failure of respondent to pay that fee did not constitute a violation of the Perishable Agricultural Commodities Act.

S-2069, October 27, 1938, Docket 3077: (S.P.)

A HUIZINGA & SONS, CHICAGO, ILL. v. E.H. DOYLE, CARIBOU, MAINE.

Violation charged: Failure to deliver a carload of potatoes in compliance with contract.

Principal points involved: When complainant and broker sought to take unfair advantage of respondent, and no loss proved, alleged contract not enforced; to enforce such contract would subject respondent to hardship amounting to injustice.

Order: Complaint dismissed.

Outline of Facts

The broker, Fresh Foods, Inc., of Chicago, obtained from respondent on October 16, 1937, shortly after 11:05 a.m., a quotation of $1.26 per cwt. for a carload of U.S. No. 1, Size A, Maine Green Mountain potatoes delivered at Chicago, Ill. Respondent's confirmation of sale to complainants was received in Chicago at 2:19 p.m. October 16. At 5:21 p.m. the respondent sent a telegram to the broker which was received in Chicago at 5:02 p.m., Central Time, notifying the broker that he had used the wrong code word and that the price was $1.53 instead of $1.26 per cwt. After receiving respondent's quotation and before confirming the sale to complainants, the broker received a quotation of $1.55 per cwt. from a dealer at Ft. Fairfield, Maine, which is in the vicinity of Caribou. Respondent did not ship the potatoes. Complainants claimed that, after being notified of respondent's offer, they sold to a firm in Milwaukee, Wisconsin, a carload of U.S. No. 1, Size A, Green Mountain potatoes at $1.55 per cwt. delivered, shipment to be made on or about October 18; that on Monday, October 18, Fresh Foods, Inc. advised them of receipt of respondent's telegram, after close of business on October 16, stating that the wrong code word had been used; and that because of respondent's failure to make shipment complainants were damaged in the sum of $112, the difference between the Chicago and Milwaukee price (29¢ per cwt. less 1¢ per cwt. additional freight, for the 400 sacks in the car.)

Respondent filed no formal answer but in a letter to the Bureau of Agricultural Economics, dated January 17, 1938, stated: "I felt then as I do now that nobody in the potato business could help but know that it was an error on my part and to be fair would not try to take advantage of such a situation but this is exactly what happened."

In support of the alleged sale of potatoes to the Milwaukee firm, complainants submitted a typewritten copy of a "confirmation of sale" with the typewritten signature of the Milwaukee firm by its president. A representative of the Bureau in Chicago interviewed complainants and the broker, the latter of whom produced a copy of the confirmation of sale like the one submitted by complainants except that the words "by *****, Pres." were signed in ink. The broker did not know whether this was the actual signature of the president since the copy was obtained from complainants.

Ruling included in Decision

Respondent's refusal to ship the potatoes to complainants was not without reasonable cause. Complainants did not satisfactorily establish the alleged sale to the Milwaukee firm and there was no evidence that the latter made any complaint when the alleged contract of sale was not fulfilled or that complainants suffered any out-of-pocket loss by reason of respondent's failure to ship, if a contract was in fact made. The broker undoubtedly knew that the quoted price of $1.26 was considerably out of line with the current market, since, after receipt of respondent's quotation and before communicating it to complainants, the broker had a quotation of $1.55 from a dealer at Fort Fairfield. The broker also claimed it had a quotation of $1.35 from a Chicago dealer but the latter could not find any record of it and said that if such quotation was made, it was based on the Chicago dealer's contract with a firm at Dover-Foxcroft, Maine, and that the difference in the freight rate would make this the same as the Ft. Fairfield quotation. Huizinga, while professing not to know what the market price was at the time, stated to the Bureau's Chicago representative that he thought it was not more than $1.45 to $1.50. The Chicago representative submitted evidence to show that it was about $1.50. It was quite apparent, therefore, that both the broker and complainants were well aware that respondent had made a mistake in quoting a price of $1.26, and they both sought to take an unfair advantage of the situation. "But where the blunder made by the person is obvious, an acceptor will not be permitted, by catching it up, to take an unfair advantage." 1 Whart. Cont. Sec. 202a; Webster v. Cecil, 30 Bev. 62; Tamplin v. James, L.R. 15, Ch. Div. 221. To enforce the contract would result in a substantial loss to respondent and subject him to a hardship amounting to an injustice. The complaint was therefore dismissed.

S-2082, November 3, 1938, Docket 2971: (Hearing)

WESTERN FRUIT GROWERS, INC., LOS ANGELES, CALIF. v. MINNECI FRUIT CO., PITTSBURGH, PA.

Violation charged: Unjustified rejection of a carload of grapes.

Principal points involved: Delay of one day not ground for rejection in delivered sale when no specific delivery date specified in contract; in delivered sale shipper required to deliver goods free from transit damage; damages cannot be allowed unless proved.

Order: Complaint dismissed; countercomplaint dismissed; publication of facts.

Outline of Facts

On or about October 18, 1937, through a broker, complainant sold to respondent two carloads of U.S. No. 1 Juice Carignane Grapes, 24% sugar, containing 1173 lidded lugs each, at $1.02½ per lug delivered Pittsburgh, Pa., which had been shipped from Turlock, Calif., on October 12 and were diverted to respondent on October 18. The cars arrived at Pittsburgh on October 21 and 22 and one was rejected by respondent on the grounds that it failed to meet contract requirements and it arrived a day late and was damaged due to shifting in transit. This rejected car was diverted by complainant to Boston and resold at a deficit of $77.43. Complainant asked an award for the contract price of $662.89, plus $77.43 deficit, or $740.32.

Respondent filed a countercomplaint claiming that the grapes in the accepted car did not meet contract terms and that, as a consequence, he suffered damages of $405.21, which he sought to recover from complainant.

Federal inspection on October 22, at Pittsburgh of the rejected car as to damage due to transit showed "Many lugs shifted to one side and are off of cleats on lugs below, covers of many of the lugs below shifted lugs are dented or broken. Bottoms of lugs generally wet." "Inspection and certificate restricted to top layer of load. It is impossible to determine the number of lugs with covers broken without unloading car." Railroad Inspection on the same date at Pittsburgh showed as to condition: "Lading shifted from north side to south side (side shift). Many air channels are blocked blocking refrigeration. Many lugs are off and partly off strips and many lugs shifted off cleats resting down upon lugs in lower layers; lids are dented and sunken resting upon contents and bruising same. 8 lugs now visible, lids are broken and part of contents bruised and damaged. It is impossible to determine full extent of damage unless all lugs are open for inspection." "62 lugs now noted, bottoms wet and stained, juice dripping over other lugs and detracting from appearance." "Inspection restricted to 3 top layers and at doorway. Lading shifted. Sunken down. Bruised. Damaged. Soft wet leakers."

Federal inspection at Pittsburgh on the accepted car showed: "Load shifted about 6 inches at top of load. Many lugs in A end of car had one or both sides broken, bottoms of lugs generally wet. Inspection and certificate restricted to top layer of load. It is impossible to determine the number of broken lugs without unloading car." Railroad Perishable Inspection at Pittsburgh showed: "Entire load tilted and listing from E.E. to W.E. Lugs wedged at W. E. Breakage.

Bruised. Damaged. Second Protest, filed by Minneci Fruit Co. 10-28-37, 2:30 p.m. Soft. Wet. Decay. Bruised and leakers placed in regular line." "Lading from B end of car shows from 4 to 6 inches slack in upper 6 layers, approximately 4 inches of slack noted in 3rd stack from end wall with lugs leaning or listing toward doorway. 4 stacks nearest bunker easily rock due to slack. Many lugs noted here show side, bottom or cover wet, stained or leaky from juice. 12 lugs noted at this end show side cut and jammed. 15 other lugs noted at opposite end interspersed are badly jammed and wedged 1 to 3 inches, berries bruised and lugs badly stained from juice. 6 other lugs noted cover lid broken. Few (8) lugs noted, lower layers, show lugs off of end cleats and pressing on covers of lugs below in non-stripped layers."

Rulings included in Decision

1. Respondent's contention that the delay of one day was ground for rejection was not well taken in view of the fact that the confirmation of sale showed that the contract did not guarantee any specific delivery date. However, respondent's refusal to accept the rejected car was justified since the aforementioned certificates clearly showed that these two carloads of grapes arrived in a damaged condition, due to shift in transit, and, in view of the fact that this was a delivered sale, the complainant did not tender for delivery grapes which met contract requirements, as the shipper was responsible for transit damage and, under the contract, had to deliver grapes free from such damage. The complaint was therefore dismissed.

2. Respondent failed to prove that he suffered any damage, due to the condition of the accepted shipment, over and above the damage which he recovered from the railroad. The record of sales showing dates and amounts for which the grapes were sold showed that respondent failed to offer the grapes for sale until seven days after their arrival, namely, October 28. Respondent filed a claim against the railroad on this car for damages due to shift in transit and received $200 in settlement, based on the market price on the date when the car was broken and offered for sale, October 28. U.S. Department of Agriculture market quotations for Pittsburg market for California black juice grapes, the kind here under consideration, for the period from October 20 to November 8, disclosed that the market was 10¢ per lug higher on October 22, the date of arrival, than on October 28, when respondent offered them for sale. Respondent therefore was responsible for fixing the measure of damages at 10¢ per lug by refraining from offering them for sale until the 28th and therefore could not be heard to claim additional damages from complainant. An examination of the records of sales and a comparison of the prices received with the quoted market prices for the dates when offered for sale disclosed that the difference between the amount received and the quoted market prices was much less than the $200 which was received by respondent from the railroad company. The countercomplaint was therefore dismissed.

S-2083, November 3, 1938, Docket 3058: (S.P.)

MALLIN PRODUCE CO., KANSAS CITY, MO. v. J.P. GROSSER, CRESCO, IOWA.

Violation charged: Failure to account for a carload of apples.
Principal points involved: Acceptance of produce by buyer does not prevent his recovery of loss sustained because produce not as represented by seller; since purchaser failed to dispose of salable portion promptly and salvage part of apples, he could not prove amount of damages.
Order: Complaint and counter-complaint dismissed.

Outline of Facts

On or about November 10, 1937, complainant sold to respondent a carload of bulk apples, Commercial grade, at 60¢ per 100 lbs. f.o.b. loading station. Shipment was made from McBaine, Mo., to Osage, Iowa, where the apples were accepted on November 15, by respondent, who paid freight of $74.40 and sold 10 bushels from the car for $8.50. The following day the remainder were sold by respondent to Kelley Bros., of Osage, for $290. Kelley Bros. stated that they sold $40 worth before reaching the defective parts of the car. The apples remaining in the car were inspected on or about November 20, and condemned as unfit for food by an inspector for the State of Iowa, with permission, however, to sort them and sell those fit for food. Kelley Bros. stopped payment on the check issued to respondent in payment for the apples and placed the balance of the apples in storage and finally destroyed them on March 1, 1938, because of their condition. Complainant contended that since respondent accepted them and made no complaint within 24 hours, he should pay for the apples.

Respondent claimed that if the apples had been as represented by complainant they would have been worth $298.50 but that due to their condition they were not worth more than $50. Respondent claimed $25 on account of loss of time, $50 for attorneys fee and $290 in addition.

The Iowa Inspector wrote the Bureau on May 4, 1938: "I examined the same and found a large portion of them were decayed, rotted, spoiled and partially spoiled, and, as such, were unfit for human consumption."

Ruling included in Decision

It seemed clear from the State Inspector's findings that the apples were not in suitable shipping condition at the time of shipment. While the respondent accepted and sold them this does not prevent his recovering any loss sustained by reason of the fact that they were not what the complainant represented them to be. Respondent, however, did not submit satisfactory proof of loss. Although the apples were condemned, nevertheless, the State Inspector gave permission to sort them and sell those fit for food. It appeared that Kelley Bros. put the apples in storage and that they were finally destroyed March 1, 1938. Kelley Bros. admitted having sold $40 worth of them. This would indicate that perhaps they could have realized considerably more if they had disposed of them promptly instead of putting them in storage. The respondent was out the freight which he paid, but it would seem that if the apples had been sold promptly by Kelley Bros. they, and consequently respondent, would have realized more than the freight. Under the circumstances both the complaint and the countercomplaint were dismissed.

S-2092, November 17, 1938, Docket 2992: (S.P.)

GREGG MAXCY, INCORPORATED, SEBRING, FLA. v. BUDISH & KAPLAN CO., INCORPORATED, WORCESTER, MASS.

Violation charged: Unjustified rejection of a carload of oranges and grapefruit.
Principal points involved: Switching shipment in accordance with buyer's instructions to broker and broker's confirmation of sale was not act of acceptance; rejection not without reasonable cause when based on Federal inspection notwithstanding later inspection showed fruit met grade.
Order: Complaint dismissed.

Outline of Facts

On or about November 27, 1937, through a broker, complainant sold to respondent one carload of Combination U.S. No. 1 and No. 2 oranges and grapefruit delivered at Worcester, Mass. Shipment was made on November 30, from Lakemont, Florida, under billing for delivery to respondent on the N.Y., N.H. & H. tracks at Worcester. On arrival at Worcester, the car was switched to the Boston & Albany tracks in accordance with respondent's standing order to the railroad to that effect. Respondent rejected the fruit and complainant then ordered the car diverted to Boston but claimed that because of the switching from the

N.Y., N.H. & H. tracks at the order of respondent diversion to Boston could not be accomplished on the through rate, which would have applied on this backhaul had the original billing not been altered, and complainant was compelled to pay additional charges of $132.55; that resale resulted in net proceeds of $244.57, and that complainant's damages amounted to $479.76, the difference between the net proceeds of the auction sale and the net proceeds which would have been realized had the contract been fulfilled. Complainant contended that the rejection was without reasonable cause, first, because respondent's act of switching the car from the N.Y., N.H. & H. tracks to the Boston & Albany tracks was an assumption of control which amounted to acceptance and, second, because the certificate covering the Federal inspection at Boston showed the fruit to be of the grade specified by the contract.

Respondent claimed to have stipulated to the broker that delivery was to be made on the Boston & Albany tracks and exhibited a copy of the broker's standard confirmation of sale specifying such delivery.

Federal inspector certified that on December 6, the date of arrival at Worcester, the oranges showed decay in excess of tolerance of U.S. Combination grade.

Rulings included in Decision

1. The standing order to the railway company to switch cars consigned to respondent to its Boston & Albany siding did nothing more, in this case, than give effect to one of the conditions stipulated in the contract. If complainant was not informed as to respondent's designation of routing, the broker was at fault in the performance of its duty, but the respondent could not be held liable for this omission. Furthermore, the complainant's contention that the act of switching constituted acceptance and, therefore, a waiver of the contract stipulations as to placement of the car and the right of respondent to inspect before acceptance could not be upheld. The converse was true, that is, the act of switching was evidence that the placement condition was not waived, and it was necessary in order that the respondent might be allowed the right of inspection in the customary manner.

2. As to complainant's contention that the produce was of the grade specified by the contract, as shown by inspection at Boston, it was held that respondent's rejection was not without reasonable cause, because respondent had a right to rely on the Federal inspection made at Worcester, which reported excessive decay in the oranges. Complainant could have protected itself by appealing the inspection, but not by reinspection several days after the rejection. The complaint was dismissed.

S-2093, November 17, 1938, Docket 3020: (S.P.)

J.E. NELSON, ALTOONA, PA. v. EDGERTON & BEERS, WASHINGTON, D.C.

Violation charged: Failure to pay brokerage fee.
Principal point involved: Broker not entitled to brokerage unless he proves he negotiated enforceable contract.
Order: Complaint dismissed.

Outline of Facts

On or about July 12, 1937, complainant undertook to negotiate the sale at $85 f.o.b. of a carload of watermelons for and on behalf of respondent and thereafter informed respondent that he had made sale to a McKeesport, Pa. firm. The melons were shipped from South Carolina to McKeesport but the alleged purchaser refused to accept them, claiming the purchase had not been authorized at the price designated by the broker. Complainant asked for an award to cover his brokerage fee.

Ruling included in Decision

Complainant had the burden of proof but failed to establish that he effected a valid sale or that the McKeesport firm signed a confirmation or memorandum making the sale enforceable. The complaint was therefore dismissed.

S-2099, December 1, 1938, Docket 2955: (S.P.)

JOSEPH ROTHENBERG, BUFFALO, N.Y. v. SYRACUSE FRUIT CO., INC., SYRACUSE, N.Y.

Violation charged: Failure truly and correctly to account for a truckload of tomatoes.
Principal point involved: Interstate character of shipment must be proved to bring transaction under act.
Order: Complaint dismissed.

Outline of Facts

On or about October 28, 1937, complainant sold to respondent 125 lugs of tomatoes at the agreed price of $1.80 per lug, or $225 f.o.b. Buffalo, N.Y. They were shipped by truck from Buffalo and delivered to respondent at Syracuse, N.Y., but no proof was submitted to show that they were loaded on the truck from a car which had been shipped to complainant from loading point in California, as alleged in the complaint, and respondent denied that any interstate movement whatever was involved in the transaction. Respondent accepted the tomatoes and thereafter paid complainant $163.70, claiming this was all that the tomatoes were worth since "they were of inferior grade, excessively spotted and decayed." Complainant asked for an award for $61.30, the unpaid balance of the purchase price.

Ruling included in Decision

Respondent failed to prove a breach of warranty, but complainant failed to prove the interstate movement of the shipment and failed to show that the contract which was entered into between the parties contemplated such movement, all of which was denied by respondent, and the complaint was therefore dismissed.

S-2104, January 12, 1939, Docket 3056: (Hearing)

GRUBER AND MINTZER, NEW YORK, N.Y. v. BORDER SERVICE, NEW YORK, N.Y.

Violation charged: Failure truly and correctly to account for a carload of grapes.
Principal points involved: Terms of contract must be definitely proved; failure truly and correctly to account must be proved.
Order: Complaint dismissed.

Outline of Facts

Complainants claimed that on or about September 25, 1937, they sold to respondents one carload of Zinfandel grapes. Subsequently a carload of 1170 lugs, which had been shipped from loading point in California, billed to complainants, was diverted in transit to Scranton, Pa., where it was accepted without objection by respondents, who thereafter sold them for the net sum of $723.83, from which was deducted 5¢ per lug commission, or $58.50, and $10.40 claimed to be due respondents as a deficit in connection with another shipment of produce, check for $654.93 being sent to complainants. Complainants asked for an award of $58.50 on the ground that this was an outright sale.

Respondents maintained that the grapes were consigned to them and that correct accounting had been made to complainants. Both complainants and respondents offered testimony of witnesses to support their contentions. Complainants claimed to have delivered to respondents an invoice covering these grapes "at $50 ton f.o.b. shipping point $818.38." Respondents claimed never to have received such invoice.

Ruling included in Decision

The record disclosed quite conclusively that no record or memorandum was shown to have been made and delivered by complainants in such manner as definitely proved that the grapes here under consideration were sold to respondents. Moreover, it appeared to have been generally known among dealers in fruits and produce in New York City that the respondents do not purchase produce but act as brokers or selling agents. A sale to them would, therefore, have been an unusual transaction, to say the least, but neither of the parties to this controversy contended that there was anything unusual concerning this transaction at the time complainants agreed to divert a carload of grapes to Scranton, Pa., for respondents. Considering the record as a whole, it was believed that complainants failed to sustain the burden of proving the allegations of their complaint which charged respondents with failure truly and correctly to account for grapes which were purchased from them, nor was there any showing that respondents failed truly and correctly to account on a consignment basis. The complaint was therefore dismissed.

S-2113, December 22, 1938, Docket 3070: (Hearing)

JOSEPH DUBIN & CO., INC., PHILADELPHIA, PA. v. CAMPBELL & COLACE, PHILADELPHIA, PA.

Violation charged: Failure truly and correctly to account for net proceeds of sale of various lots of consigned produce.
Principal points involved: Liability of a bankrupt on claims for payment of purchased produce must be settled in bankruptcy proceedings; whether transaction was purchase or consignment.
Order: Complaint dismissed.

Outline of Facts

Complainant alleged that the following shipments of produce were consigned to respondents, who accepted them and made sale for the account of complainant, but failed to render accounts sales or pay the net proceeds therefor:

On or about	March	11, 1938,	570	crates	carrots,	shipped from	Mercedes, Tex.
"	"	"	60	"	beets		
"	"	14, 1938,	132	"	artichokes	"	" Oceana, Calif.
"	"	17, 1938,	100	"	"	"	" " "
"	"	23, 1938,	41	"	carrots	"	" Brawley, "

Respondents contended that on or about April 1, 1938 account sales was delivered to complainant and on or about May 16, a check for $73.57 in payment of the net proceeds for the 41 crates of carrots was tendered, but was refused by complainant; that the remainder of the produce herein mentioned was not consigned to them, but was purchased, and that they were in bankruptcy and must submit to the requirements and orders of that court in making payment for the purchased produce.

The attorney who appeared at the hearing on behalf of the receiver in bankruptcy suggested that, since the bankruptcy court takes jurisdiction of all matters pertaining to claims against the bankrupt, it might be advisable to discontinue this proceeding and allow the controversy to be determined by the U.S. District Court, or a referee thereunder. The examiner properly refused to dismiss the case until adequate consideration could be given by the Secretary to all facts involved.

Complainant's representative testified at the hearing that the produce in dispute was delivered to respondents with the understanding that they would sell it and thereafter would be charged with the price for which it had been sold, less a reasonable allowance for making sales. Apparently no written memorandum was made at the time the produce was turned over to respondent, but a memorandum bill appeared to have been sent by complainant to respondents after the price had been established. These memorandum bills, with the exception of the one covering the 41 packages of carrots, showed transportation and other charges set forth against receipts and disclosed that all items were handled at a loss. In the case of the memorandum bill covering the 41 packages of carrots, the only item charged against the gross receipts was a 10% selling charge.

Ruling included in Decision

It was clear that respondents were billed for the 41 packages of carrots in a different manner than for the remainder of the produce. Considering the record as a whole, it was believed that, with the exception of the 41 packages of carrots, respondent must be held to have purchased the produce at a price to be fixed after it had been sold by them. It is, of course, a well settled principle of law that the parties must reach an agreement with reference to price before there can be a binding contract of sale, and it is equally clear that the price need not be definitely fixed at the time of the sale if the agreement contains express or implied provisions by which it may be rendered certain. Since these purchases were at prices to be based on what could be obtained by respondents, and since respondents apparently stood ready and willing to account in full for the net proceeds received from the consigned carrots, it was believed that the question of the liability of respondent was one to be settled in the bankruptcy proceeding, and the complaint was therefore dismissed.

S-2117, December 22, 1938, Docket 3108: (Hearing)

PHILADELPHIA PRODUCE CREDIT AND COLLECTION BUREAU, PHILADELPHIA, PA. v. CAMPBELL & COLACE, PHILADELPHIA, PA.

Violation charged: Failure to account to complainant, as assignee of fifteen dealers, for numerous lots of commodities purchased from the assignors.
Principal point involved: Adjudication of respondents as bankrupt made necessary dismissal of complaint.
Order: Complaint dismissed.

Outline of Facts

At the opening of the hearing, respondents' attorney moved to dismiss this proceeding, due to the fact that on October 18, 1938, respondents filed a voluntary petition in bankruptcy in the U.S. District Court for the Eastern District of Pennsylvania, and on that day they were adjudicated bankrupt. The Examiner overruled this motion and proceeded to take such testimony as was offered.

Ruling included in Decision

It was believed that respondents' motion to dismiss should have been granted and the proceeding dismissed. The Secretary therefore ordered that the complaint in this case be dismissed without prejudice.

S-2119, January 12, 1939, Docket 3114: (S.P.)

DEMARCO CO., INC., BALTIMORE, MD. v. MEYER SCHUMAN CO., CHICAGO, ILLINOIS.

Violation charged: Failure to deliver a carload of grapes in accordance with contract.
Principal points involved: Terms of contract must be proved; to collect damages buyer must prove produce did not meet contract specification.
Order: Complaint dismissed.

Outline of Facts

On or about December 27, 1937, duly authorized representatives of complainant and respondent entered into an agreement during the course of a long distance telephone conversation whereby complainant contracted to buy from respondent a carload of grapes then "on track at Chicago" at $1.80 per lug f.o.b. Chicago. Respondent thereafter shipped the grapes to Baltimore, Md., where they were accepted by complainant, who apparently paid to respondent the agreed purchase price. Complainant filed claim for alleged loss of $760.85, the difference between the sum received for the grapes and the amount claimed to have been received for an equal number of lugs of similar grapes sold by complainant at Baltimore, Md. at approximately the same time.

Complainant contended that it was understood that the grapes graded U.S. Fancy at Chicago, while respondent claimed that the agreement provided for shipment of "grapes that carried government inspection grading U.S. Fancy in storage" and "that car was sold with no grade specified to complainant by said respondent." A letter written on December 27 by complainant to respondent stated: "This confirms telephone conversation with you today of our purchase of the above car Corsair Brand Emperor grapes at $1.80 f.o.b. Chicago, U.S. Fancy." There was no positive showing that any reply was made to the previously-quoted letter, but it was definitely shown that on December 30 respondent wrote complainant: "Reference our telephone conversation concerning *** car of grapes sold you the other day, we are enclosing herewith copy of inspection certificate at shipping point and you will note same grades U.S. Fancy and is a very good car of grapes at that." The invoice made by respondent on December 27 specified "1098 Lugs Emperors Corsair Brand @ 1.80 F.O.B. Chicago."

Federal-State inspection at Antes, Calif. on December 9 showed that the grapes then graded U.S.Fancy Table. Federal inspection at Baltimore on December 29 showed that the shipment "now fails to meet requirements of U.S. Fancy Table only account of bruised berries in excess of tolerance allowed."

Ruling included in Decision

Complainant failed to prove that the contract between the parties provided that the grapes were to grade U.S. Fancy Table at Chicago, Illinois and also failed to furnish positive proof that they failed to meet the requirement for that grade at that point. It is an elementary principle of procedure that the burden of proof rests upon the complainant to prove the terms of the contract relied upon, and breach thereof, before the respondent is obligated in any way to furnish rebuttal testimony in order to relieve itself of liability. The complaint was therefore dismissed.

S-2123, January 14, 1939, Docket 3041: (Hearing)

PHILADELPHIA PRODUCE CREDIT & COLLECTION BUREAU, PHILADELPHIA, PA. v. JOSEPH COHEN, PHILADELPHIA, PA.

Violation charged: Failure to account for produce purchased in interstate commerce.
Principal point involved: Complaint dismissed due to bankruptcy proceedings against respondent.
Order: Complaint dismissed.

Outline of Facts

Complainant alleged that respondent is indebted to complainant, as the assignee of 21 dealers, for numerous lots of produce purchased by respondent in the course of interstate commerce from said dealers who assigned their claims to complainant.

Respondent's answer denied generally the material allegations contained in the complaint and challenged the right of complainant to proceed under the act because of failure to show that interstate commerce was involved in any of the transactions and for the further reason that respondent made an assignment to complainant for the benefit of creditors prior to the filing of the complaint herein and three of the assignees filed an involuntary petition in bankruptcy against respondent before the complaint was filed in this proceeding.

At the opening of the hearing respondent's attorneys moved to dismiss this proceeding because all claims involved were included in the bankruptcy proceeding, as well as the assignment to creditors. The examiner overruled this motion and proceeded to take such testimony as was offered.

Ruling included in Decision

Respondent's motion to dismiss this proceeding due to bankruptcy should have been granted. The complaint was therefore dismissed without prejudice.

S-2132, January 19, 1939, Docket 2470: (Hearing)

NASH DECAMP CO., LOS ANGELES, CALIF. v. LEVY & KLAHR, INC. and MAX KLAHR, NEW YORK, N.Y.

Violation charged: Unjustified rejection of two carloads of grapes.
Principal point involved: Certificates of inspections four days before shipment and 7 days before sale insufficient to prove grapes in rolling car met contract requirements at time and place of sale.
Order: Complaint dismissed.

Outline of Facts

The original complaint in this case alleged that on or about December 27, 1935, through a broker, complainant sold to the respondent corporation two carloads of Nadco Brand U.S. Fancy Emperor grapes at the agreed f.o.b. price of $1.50 per lug, subject to inspection and acceptance at shipping point by respondent; that grapes meeting contract requirements at the time of shipment, December 24, were tendered to and rejected by respondent and thereafter resold by complainant at a net loss of $1356.90, for the recovery of which the complaint was filed. The amended complaint set forth substantially the same facts, but included Max Klahr as a respondent without attempting to show how it was proposed to hold either respondent liable except as it was alleged generally that they both rejected the shipments without reasonable cause.

Respondents interposed a general denial of liability and alleged failure to comply with the Statute of Frauds as a further and separate defense.

As evidence of the sale complainant relied on two copies of standard memoranda of sales made out by the broker on December 27, each setting forth a sale for complainant to Max Klahr of one carload of Nadco Brand U.S.Fancy Emperor grapes at the f.o.b. price of $1.50 per lug "shipping point inspection and acceptance." It was shown that 2 carloads, each containing 972 lugs of Emperor grapes, which had been shipped on December 24 from California, were thereafter diverted while in transit and were tendered to one or both respondents and refused. Copies of certificates of Federal-State inspections on October 25 and November 4, 1935 showed the grapes then graded U.S. Fancy Table. Copies of two other certificates of Federal-State inspections for condition only, made on December 20, were submitted.

Ruling included in Decision

Complainant failed to prove that the grapes met contract requirements as alleged at the time and place of shipment. The Federal-State inspections, evidenced by certificates submitted by complainant, the last of which was made on December 20, which was a few days prior to shipment and seven days prior to date of sale, failed to show that the grapes met contract requirements at the time and place of sale. Complainant also failed to prove the existence of a valid and enforceable contract. The complaint was therefore dismissed.

S-2144, January 25, 1939, Docket 2973: (Hearing)

TRACY-WALDRON CO., SALINAS, CLAIF. v. THE ROSENBLUM BROS. CO., YOUNGSTOWN, OHIO.

Violation charged: Failure to account for a carload of grapes.

Principal points involved: In absence of other evidence, contract purchase price considered as market value of grapes of kind and quality that should have been delivered; allowance of commission to buyer for resale of goods not meeting contract not proper.

Order: Complainant awarded $381.18, plus interest.

Outline of Facts

On or about October 9, 1937, through a broker, complainants sold to respondent three carloads of U.S. No. 1 juice grapes at 92½¢ per lug for the Alicantes and 87½¢ per lug for the Muscats, delivered at Youngstown, Ohio. The dispute in this case concerned only one car, containing 250 lugs of Alicantes and 965 lugs of Muscats, which was shipped from California on or about October 1 and was in transit at the time the sale was made. The car was invoiced to respondent for the net sum of $536.14. It arrived at Youngstown on October 12, at which time respondent examined the grapes and wired complainants that they were wet, moldy and decayed. Complainants stated that they were reliably informed that respondent paid $16 for extra icing, which complainants were willing to credit against the purchase price, and they therefore asked for an award of $520.14.

Respondent claimed a right of set-off in the sum of $178.96 plus a commission of 10% of the gross sale, or $89.67, plus the charge for extra icing of $16, or $284.63, from which a deduction of $40 was made as a credit for payment received from complainants by check dated October 23. This left a net sum claimed by respondent of $244.63.

Inspection at Youngstown at 9 a.m. on October 12 by an inspector of the Railroad Perishable Inspection Agency showed: "Lugs in upper 4-5 layers are wet and leaking due to weak berries. Grapes are firm, juicy to 15% raisining, sweet, showing 7 to 8% shattering. Stems drying. 1 to 2% Grey Mold Decay." The inspector testified at the hearing that he examined representative samples in the upper four to five layers of the load and found the lugs wet and leaking due to weak berries. Another witness testified that he examined the shipment when about one-third of the grapes had been unloaded and that about one-third of the grapes remaining in the car were a little wet. Upon being questioned further, he stated that a few lugs were "pretty wet" and that the rest of the grapes were in good condition.

Ruling included in Decision

Complainants failed to deliver grapes which met contract requirements. The U.S. standards for U.S. No. 1 juice grapes provide that not more than 10% of the grapes, by weight, in any one container may be below requirements for this grade, but not more than 5%, by weight, may be seriously damaged. Serious damage means any defect or injury which seriously affects the shipping or market quality, including grapes which are crushed or wet. Since the record clearly indicated that 7 to 8% of the grapes were shattered and other defects exceeded 3%, it was clear that they were not U.S. No. 1 grade when delivered to respondent at Youngstown. The Uniform Sales Act which has been enacted

into law in the State of Ohio in substance provides (sections 49 and 69) that acceptance of goods by the buyer shall not discharge the seller from liability in damages for breach of the seller's warranty and that the buyer may accept the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the contract price. Respondent's damages should be measured by the difference between the value of the grapes delivered and the value they would have had if in accordance with contract requirements. The record showed that the market value of the grapes delivered was $896.67, this being the gross sum realized from sale by respondent. In the absence of other evidence, the contract price of $1075.63 was considered as the market value of grapes of the kind and quality that should have been delivered. The difference of $178.96 was set up in diminution of the contract purchase price. The commission charge of 10% of the gross, $89.67, was not a proper item of damage and for this reason could not be allowed. Respondent was entitled to $178.96 plus the icing charge of $16, or $194.96. After crediting complainant with the payment of $40 made to respondent by check of October 23, the net sum which respondent was entitled to set up in diminution of the purchase price was $154.96. Since the net invoice price under the contract was $536.14, complainant was awarded that sum less $154.96, or $381.18, plus interest.

S-2150, February 11, 1939, Docket 3050: (Hearing)

THE MILLER FRUIT CO., INC., HEALDSBURG, CALIF. v. THE MILLER GRAPE CO., NEWARK, N.J.

Violation charged: Failure truly and correctly to account for one car of grapes; unjustified rejection of two cars of grapes.
Principal point involved: To collect damages because of rejection, seller must prove produce met contract specifications.
Order: Complaint dismissed.

Outline of Facts

On or about September 21, 1937, complainant sold to respondent 8 carloads of U.S. No. 1 Petit Syrah grapes at $47 per ton f.o.b. shipping point, and one carload of U.S. No. 1 Alicante grapes at $35 per ton f.o.b. Respondent was to advance $100 per car, or $900, receipt of which was acknowledged by complainant, and

it was agreed that complainant would be released from liability for failure to deliver "in the event of adverse weather conditions or other acts of God", in which case any unused portion of the advance was to be returned by complainant. Complainant shipped 3 carloads of grapes from loading point in California to Newark, N.J., where they were accepted by respondent and the contract purchase price therefor paid. A fourth carload of Petit Syrah grapes was shipped on October 12, billed to a Newark dealer, and on October 16 was diverted to respondent and accepted at the purchase price of $721.92, and on October 20 and on October 22 a carload of Alicantes and one of Petit Syrahs were shipped, but these two cars were refused by respondent and complainant made resale at a claimed loss of $1064.27. Complainant asked for an award of $1386.19 to cover the unpaid balance of the contract price of the fourth car and the loss sustained on the other two.

Respondent alleged that on or about October 16, complainant's agent, who had handled the transaction, advised respondent that complainant would be unable to deliver the remaining six carloads under the agreement and therefore requested respondent to accept the fourth carload at the contract purchase price of $721.92 and deduct therefrom the remaining $600 of the advance by respondent and pay the balance to the agent. Complainant contended that this shipment was accepted by respondent under the original contract and the agent therefore refused respondent's check for $121.92 in payment therefor, which check was later sent to and retained by complainant.

The record showed that rains occurred at shipping point early in October and also just prior to the middle of the month. In his testimony the agent admitted that around the 16th of the month the rains had adversely affected the grapes and that he had discussed this matter with respondent's officials, one of whom testified that at this time complainant's agent was willing to make further shipments only if the U.S. No. 1 requirements were waived. The record showed that complainant's agent wrote the Department on November 18, 1937, stating that because of adverse weather conditions complainant had been able to ship only six carloads to respondent and his testimony indicated that the sixth shipment was the last offered to respondent and was about the last of complainant's shipments of grapes.

Rulings included in Decision

1. It was evident the grapes had been damaged by the rains occurring prior to the middle of October but complainant did not show that the fifth and sixth shipments graded U.S. No. 1 as required by the contract. Complainant therefore failed to show that it made good delivery under the contract with respect to these two shipments and that the loss claimed was not due in part at least to grapes of an inferior quality or condition, and that it was entitled to the amount claimed as damages.

2. Since complainant's agent advised respondent that the remainder of the grapes included in the agreement would not be shipped because of rains in California, respondent's failure to accept the last two shipments tendered was not without reasonable cause. Respondent should be permitted to deduct the unused portion of the advance from the purchase price of the fourth carload, which shipment would be paid for in full when complainant cashed respondent's check for $121.92. The complaint was therefore dismissed.

S-2152, February 16, 1939, Docket 3148: (S.P.)

MEYER SCHUMAN CO., CHICAGO, ILL. v. FRUIT SUPPLY CO., ST. LOUIS, MO.

Violation charged: Unjustified rejection of a carload of cauliflower.
Principal point involved: Terms and specifications of oral contract must be proved by complainant.
Order: Complaint dismissed.

Outline of Facts

The carload of cauliflower in question was shipped from Guadalupe, California, March 7, 1938, consigned to complainant at Montreal, Canada. Among the endorsements stamped on the shipper's bill of lading was the direction to the carrier to "stop car Chicago, Illinois for inspection". Federal inspection of the load on the day of shipment fixed the grade as U.S. No. 1. Complainant alleged that on March 16 it sold the cauliflower to respondent, through its agent, the Pioneer Fruit and Commission Company of Chicago, at $1.25 per crate f.o.b. Chicago, on a verbal order given to the agent over the telephone.

Respondent admitted giving the agent a verbal order for a carload of cauliflower but maintained that it was for a "fresh arrival" load that would grade U.S. No. 1 at St.Louis and that it further stipulated that the cauliflower must be "white and compact with good green jackets."

Ruling included in Decision

Complainant's cause of action rested on an oral contract. Complainant assumed the burden of establishing by competent and convincing evidence the terms, conditions and essential particulars of such oral contract. The record should have outlined the language used by the parties who participated in the telephone conversation, or the substance thereof, so that the terms, specifications and conditions of the contract could be said to have been established. Such details were essential to a determination as to whether a contract was consummated and whether either of the parties thereto was guilty of a breach of contract. In the absence of description or recital of what was said in the telephone conversation it could not be determined whether the Pioneer Fruit and Commission Co. acted as agent or otherwise and the evidence was insufficient to support the allegations of the complaint as to essential details of a contract. The complaint was therefore dismissed.

S-2153, February 16, 1939, Docket 2614: (S.P.)

THE CHAS. ABBATE CO., CHICAGO, ILL. v. J. H. LIVINGSTON, BELLE GLADE, FLORIDA.

Violation charged: Failure to pay deficits incurred in sale of 3 carloads of beans for account of respondent.

Principal point involved: Knowledge of principal's agent as to capacity in which subagent acted is imputable to to the principal.

Order: Complaint dismissed.

Outline of Facts

Complainant alleged that on December 2, 4 and 5, 1936, respondent, in accordance with a verbal contract with Tom Amendola, Florida agent of complainant, shipped from Florida 3 carloads of fresh beans to complainant at Chicago, Ill., for sale on consignment; that complainant made accommodation advances to represent in the sum of $1432.10; and that after deducting the advances and necessary expenses from the gross proceeds of sale the account of respondent showed a deficit of $774.64, for which respondent failed to account.

Respondent contended that he acted as a subagent of complainant's agent in securing the produce in question from various growers, in distributing the accommodation advances to the growers and in shipping the produce to complainant. He also stated that he acted as negotiator in the transaction in question through courtesy and freindship and received no compensation. Complainant contended that this statement was in contradiction of Tom Amendola's statement that respondent was to receive 30% of the commission secured.

Tom Amendola, complainant's agent, by affidavit stated: *** "That he had the Charles Abbate Co. advance money to J.H. Livingston on account. * * * That it was purely a business transaction; that the advance to the said J.H.Livingston was purely accommodation and had the returns been sufficient to have paid the advance, the freight, and the commission, then the said J.H.Livingston would have been entitled to an amount equal to 30 percent of the commission. ***" In reply to this affidavit complainant submitted only a denial, without elaboration or corroboration.

Ruling included in Decision

The statement of complainant's own agent in the transaction was strong evidence in support of the contention that respondent was actually a subagent of complainant's agent, and that the complainant's agent had knowledge that the accommodation advances were transmitted to the growers or vendors. Respondent merely stated that he received no compensation, without denying that he was acting in behalf of complainant in securing the consignment. It was quite possible that complainant was at the time of the transaction uninformed as to the capacity in which respondent acted, but the knowledge of the complainant's agent as to the capacity in which the respondent acted is imputable to complainant. The complaint was therefore dismissed.

S-2154, February 16, 1939, Docket 2893:(Hearing)

R.H.DIETZ & CO., CHICAGO, ILL. v. MORGAN CO., L. & B. PRODUCE CO., C.H.ROBINSON CO., and EMPIRE FRUIT CO., CLEVELAND, OHIO.

Violation charged: Unjustified rejection of two carloads of watermelons.
Principal point involved: When contract is not severable, failure of produce in one car to meet contract specifications justifies rejection of both cars covered by contract.
Order: Complaint dismissed.

Outline of Facts

On or about July 28, 1937, complainants entered into negotiations through C.H.Robinson Co., as broker, for the sale of two carloads of watermelons which were shipped from points in Georgia to Cleveland, Ohio, the watermelons to be "red cutters", one carload to average 26 lbs. and the other 28 lbs. The melons were rejected upon arrival at Cleveland and one of the cars was resold at Canton, Ohio for net proceeds of $84.35 and the other at Cleveland at a deficit of $18.24. Complainants asked for damages of $433.89.

Federal-State inspection certificate for one car at point of shipment read, in part: "Flesh is pale red to red mostly red ***". Federal inspection at Cleveland showed that about 20% of the melons were pale red. There was no official inspection of the other car at Cleveland.

Ruling included in Decision

The watermelons were not "red cutters" as specified in the contract of purchase and sale. An examination of the contract and the circumstances surrounding its formation indicated clearly that it was the intent of the parties that it should be regarded as an entire contract. This being the case and since the melons in the car inspected failed to comply with the specifications of the contract, the rejection of both cars was not without reasonable cause.

S-2167, February 21, 1939, Docket 3122: (Hearing)

Re: Application of Joseph Schilit, Pittsburgh, Pa., for a license under the Perishable Agricultural Commodities Act.

Principal point involved: Violation of act not sufficient ground for refusal of license when it appeared the obligation incurred thereby might be extinguished without loss to shipper.

Order: On payment of the required fee a license should be issued to Joseph Schilit.

Outline of Facts

Joseph Schilit, of Pittsburgh, Pa., filed an application for a license under the Perishable Agricultural Commodities Act. Because of certain obligations believed to have been incurred in violation of the act by the Schilit Produce Co., formerly a licensed partnership under the act, and in which Joseph Schilit was a partner, it was believed advisable to order applicant to show cause why the Secretary of Agriculture should not refuse to issue a license to him. The order to show cause set forth five transactions occurring between March, 1935 and June, 1936 in which the Schilit Produce Co. failed to account truly and correctly in respect to interstate shipments of perishable agricultural commodities.

The record showed that Joseph Schilit withdrew on January 1, 1936 from the partnership which operated as Schilit Produce Co. A part of only one of the five transactions in which the Schilit Produce Co. was alleged to have violated the act occurred prior to January 1, 1936. In respect to that transaction, the record showed that the Schilit Produce Co. failed to account truly and correctly for the full proceeds of $332.96 due the Henry C. Hollman Produce Co. from the sale of 110 bbls. of horseradish received on or about April 14, 1935, but Abe Schilit, an individual, trading as the Schilit Produce Co., successor of the partnership, by payments from time to time had reduced the amount due on this shipment and another one received after January 1, 1936, to $150.21.

Ruling included in Decision

As a partner in the Schilit Produce Co. which violated the act by failing to account truly and correctly to the Henry C. Hollman Produce Co. within a reasonable time, the applicant did engage in the practice of a character prohibited by the act, but since it appeared that the obligation incurred by the violation had been materially reduced and might be extinguished without loss to the shipper, sufficient grounds for the refusal of a license did not exist. It was therefore ordered that on payment of the required fee a license under the act should be issued to Joseph Schilit.

S-2171, March 10, 1939, Docket 2751: (Hearing)

G.E.WATSON, MERCEDES, TEXAS v. CHAS. ABBATE CO., CHICAGO, ILLINOIS.

Violation charged: Failure truly and correctly to account for a carload of beets and a carload of cabbage.
Principal point involved: Shipper's letter to receiver, making no protest to receiver's right to handle on consignment & referring to "our loss and yours also", indicated original f.o.b. contract had been changed by subsequent agreement.
Order: Complaint dismissed.

Outline of Facts

Complainant and respondent entered into a contract for the purchase by respondent from complainant of one carload of beets for a total price of $360 and one carload of cabbage for a total price of $247 f.o.b. Mercedes, Texas, shipping point acceptance final. On or about January 7, 1937, complainant shipped the beets and on or about February 23, 1937, he shipped the cabbage to respondent at Chicago, Illinois. Inspection at destination showed that the beets had been damaged by lack of proper icing, packing or the use of improper railway equipment. Respondent alleged that complainant was advised of the condition of the beets and authorized respondent to sell them on consignment, which sale resulted in a deficit of $239.31, which respondent deducted from the purchase price of the carload of cabbage and the balance of $7.69 was tendered by respondent and refused by complainant.

Complainant by deposition denied authorizing sale of the beets on consignment. Complainant asked for an award of the purchase price of both carloads.

The record showed that on January 12, 1937, respondent instructed its agent that it would not accept the inferior carload of beets. The agent testified that when he transmitted respondent's protest to complainant an agreement was reached whereby respondent was to handle the beets on consignment, without the customary commission fee. Respondent introduced as exhibits a telegram of January 12 and also a sworn statement dated May 12, 1937, both signed by the agent, which agreed in substance with the oral testimony of the agent in regard to the formation of the consignment agreement.

Ruling included in Decision

Respondent properly offset the deficit of $239.31 incurred in selling the beets against the purchase price of the carload of cabbage. Complainant failed to introduce any evidence in explanation or denial of a letter over his signature of March 1, 1937 (submitted as an exhibit by respondent), reading as follows: "Reference above car; please send us paid freight bill for this car and we will file claim and endeavor to recover our loss on this car and yours also. These beets were in good condition, well packed and iced when shipped so there is no doubt that the trouble is due to faulty equipment." It was peculiar, if complainant had not entered into an agreement to alter the contract of purchase and sale to one of consignment, that no protest of respondent's right to handle on consignment was made in this letter. Furthermore, the reference to "our loss and yours also" indicated that complainant was not relying on the original f.o.b. contract of purchase and sale. The complaint was therefore dismissed.

S-2177, March 14, 1939, Docket 3017: (S.P.)

CLOOBECK & MOSE, INC., CHICAGO, ILL. v. FRUIT PRODUCTION CO., INC. and G. A. LOUDENBACK, PRESIDENT OF THE CORPORATION, WENATCHEE, WASHINGTON.

Violation charged: Failure truly and correctly to account for joint account shipments of pears and apples.
Principal point involved: Under joint account agreement receiver entitled to receive half of freight claims collected by shipper.
Order: Complainant awarded $298.56 against Fruit Production Co., Inc.

Outline of Facts

On or about August 29, 1935, through a broker, complainant and the Fruit Production Co., Inc. entered into a joint account agreement for the purchase and sale of 10 carloads of Anjou pears at the joint-account cost of $1.20 per box for Extra Fancy and $1 per box for Fancy grade, sales made by either party f.o.b. shipping point to be "subject to each others approval", while store or auction sales were to be subject to the approval of the broker. On or about September 30, 1935, they entered into a joint account agreement for the purchase and sale of 2 carloads of Extra Fancy Jonathan apples at the joint account cost of 90¢ per box and 2 carloads of Fancy at 80¢ per box. Complainant thereafter in-

structed respondent not to ship any of the produce to Chicago, Ill., and respondent accordingly sold 12 carloads at auction in New York City and through brokers at Minneapolis, Minn. and Washington, D.C. The parties reached a settlement with the exception of the freight claims. After collecting a considerable portion of the freight claims, the Fruit Production Co., Inc. in July, 1937, gave complainant 3 promissory notes for $78.56 each, signed by G. A. Loudenbach as president of the respondent corporation, maturing on October 1, November 1 and November 15, 1937. Complainant was unable to secure any payment whatever on these notes but it was understood that they were included in the record merely as evidence of admitted indebtedness, since the claim as set forth in the complaint was not based on them. The division of the freight claims was therefore the only thing to be considered.

Respondent admitted collection of $597.11, one-half of which, or $298.56, admittedly belonged to complainant. Respondent originally made a charge of $20 per car for services in selling 12 carloads of the fruit, but later contended that this was not adequate and that 5¢ per package should have been charged. Respondent therefore requested that its charge against the joint account of $20 per car, or $240, be disregarded and instead a charge of 5¢ per box, or $440.30, be allowed, thus giving them a credit of $200.30 to be applied on the $298.56, admitting that $98.26 was due complainant.

Complainant called attention to the fact that of the 12 shipments on which respondent charged brokerage, 8 were sold at auction in New York City, 3 were sold through a broker at Minneapolis, and 1 through a broker at Washington, D.C., and that therefore respondent was not entitled to a brokerage charge for negotiating the sales.

Ruling included in Decision

Respondent had no claim against complainant and the record failed to show that G. A. Loudenback was individually liable. Complainant was therefore awarded $298.56, plus interest, against Fruit Production Co., Inc.

S-2180, March 17, 1939, Docket 2808: (S.P.)

J. R. PAXTON, MERCEDES, TEXAS v. MARK OWEN & CO., CHICAGO, ILL.

Violation charged: Unjustified rejection of a carload of tomatoes.
Principal points involved: Buyer's notification to seller that goods were not responsive to the contract and would be accepted only with an allowance amounted to a rejection; however, when appeal inspection showed goods did not meet specifications, rejection was justified.
Order: Complaint dismissed

Outline of Facts

On July 16, 1936, complainant sold to respondents one carload of 625 lugs of green-wrapped tomatoes, 85% U.S. No. 1, at 70¢ per lug, f.o.b. shipping point, or $437.50. Shipment was made from Atwood, Tenn., on July 15, and the car was diverted to respondents at Chicago, Illinois, where it arrived on Saturday, July 18. Respondents made an examination and found the tomatoes inferior to the quality and grade specified at time of purchase, and through their agent they personally notified complainant on July 18, and again on Monday, July 20, and on both occasions requested an allowance or adjustment of the agreed purchase price before formal acceptance of delivery. Complainant refused to negotiate and insisted upon full payment as a condition precedent to consideration of an allowance or other price adjustment. Complainant alleged that the sale was made "f.o.b. shipping point acceptance", as evidenced by invoice dated July 16, showing the terms "f.o.b. cash" and bearing a notation "Sold your Mr. Rubin f.o.b. acceptance"; that respondent refused to accept upon arrival at Chicago, but that said refusal was not made until one week after arrival; and that the shipment had to be abandoned to the carriers because of badly deteriorated condition. Complainant sought an award for the purchase price.

Respondents denied that the shipment was purchased f.o.b. shipping point acceptance and claimed that the purchase was made f.o.b. shipping point on the basis of complainant's representation that the tomatoes were 85% U.S. No. 1 grade, and submitted the original of an invoice received from complainant, dated July 18, showing the sale "f.o.b. cash" only. Both this invoice and the one submitted by complainant were on complainant's office invoice and were therefore presumably prepared by complainant or his employees.

Federal-State of Tennessee inspection on July 15 at shipping point showed that the shipment contained less than 1% decay, with an average of 15% grade defects, thereby qualifying as 85% U.S. No. 1 quality. Federal appeal inspection at Chicago on July 22 disclosed 2% fresh worm injury, 3% decay and 10 to 40% in lugs, averaging approximately 25% grade defects, grading approximately 70% U.S. No. 1 quality.

Rulings included in Decision

1. The invoice sent to complainant was prepared at the time of the transaction and should correctly set forth the terms of sale. Generally speaking, in a purchase made "f.o.b. cash" the buyer is expected to make immediate payment, either in cash or by check or by funds wired to the seller. In this case, however, the buyer's agent drew a draft which was accepted by the seller. This tended to the belief that the parties were not clearly in accord in their interpretation of the term "f.o.b. cash" which appeared on each invoice. It was clear, however, that they intended at least to negotiate on the basis of a certain price, f.o.b. shipping point, and the contract was so interpreted in considering the merits of the complaint.

2. The rules and regulations provide that the buyer in an f.o.b. purchase has the right of inspection at destination before goods are paid for, but only for the purpose of determining that the produce complied with the terms of the contract at time of shipment. Respondents made such examination and notified complainant of their finding. It has been held in a previous decision that when goods have been delivered to a buyer, he must either accept or reject and has no right to qualify his acceptance or rejection by attaching a condition; that a buyer's request for a reduction in price upon arrival therefore amounted to a positive rejection within the meaning of the act. The circumstances in the case under consideration were analogous to those in the cited case. Complainant was notified on the day of arrival that the tomatoes were not responsive to the contract and would be accepted only with an allowance. This notice to complainant amounted to constructive rejection and since such notice was given within 24 hours after arrival at Chicago, the rejection was made within a reasonable time.

3. Complainant failed to deliver tomatoes of the grade specified in the contract. The appeal inspection was merely evidence in support of respondents' position taken on the date of arrival at Chicago. Respondents originally agreed to pay a certain price for tomatoes of the grade and quality represented to them by complainant. In view of the evidence developed at Chicago, respondents were justified in electing to reject the shipment upon failure to obtain a satisfactory adjustment in price. The complaint was therefore dismissed.

S-2183, March 17, 1939, Docket 2830: (S.P.)

CROWN PACKING CO., LOS ANGELES, CALIF. v. ANDREWS BROTHERS, INC. of CALIFORNIA, LOS ANGELES, CALIF.

Violation charged: Failure to account for a carload of cantaloupes.
Principal points involved: Three hours precooling not sufficient to meet requirement that cantaloupes be precooled; buyer liable for contract price less proved loss on produce which did not meet contract specifications.
Order: Complainant awarded $230.25, plus interest; countercomplaint dismissed.

Outline of Facts

On June 24, 1937, respondent's agent examined and purchased from complainant a carload of 293 crates of field-packed cantaloupes for $482.25 delivered at El Centro, California for shipment from that point to respondent at Kansas City, Mo., the cantaloupes to be precooled before shipment. The cantaloupes were shipped to respondent at Chicago, Illinois where Federal inspection on June 30 indicated abnormal deterioration, concerning which complaint was promptly made by respondent. However the cantaloupes were accepted and resold by respondent and complainant asked for an award in the amount of the contract purchase price.

Respondent filed a counterclaim, alleging complainant was indebted to it for loss sustained in handling the shipment, occasioned by complainant's failure to deliver cantaloupes properly conditioned for shipment, claiming they were not properly precooled. After finding they could not be resold successfully in Chicago respondent shipped them to Youngstown, Ohio, where they were resold by another firm on joint account with respondent at a claimed loss of $415.40, the difference between the contract purchase price of $482.25 and reported net resale price of $66.85, for which respondent asked recovery.

The record showed that after being loaded the cantaloupes were precooled for approximately 3 hours by the Perishable Air Conditioners, after which the pulp temperature was claimed to have been reduced to 58° F.

Certificate of inspection at Chicago showed: "Stock mostly firm, few hard, approximately 20% slightly soft, in half of crates no soft noted, in many 6% to 25%, in some 45% to 55%, averaging approximately 15% for the lot soft and mushy. Less than 1/2 of 1% decay. Most soft stock occurs in crates from about 1/4 length of car to center brace."

Ruling included in Decision

Investigations which have been made by experts in the employ of the U.S. Department of Agriculture indicate quite conclusively that the temperature of the bulk of a carload of cantaloupes cannot be reduced to 58° F. in three hours, as was claimed to have been done by complainant in this proceeding, and that proper precooling with the apparatus customarily used requires eight to ten hours. It necessarily followed that complainant failed to make good delivery, for which breach of contract respondent should recover any damages which it showed were sustained by it. However, respondent paid no part of the contract purchase price and suffered no actual loss. Its claim was therefore denied, but it should be permitted to deduct from the contract price the amount of such damages as could be shown to have been sustained. Resale was made to the Youngstown, Ohio, dealer for $839.50, but this dealer rejected them and subsequently agreed to take the second and bottom layer crates at the invoice price and handle the top layer crates for the seller's account. The 106 top layer crates were sold for $53, or $252 less than the invoice price, which amount represented respondent's damages resulting from breach of contract by complainant. Complainant was therefore awarded $482.25 less $252, or $230.25, plus interest.

2. Respondent's countercomplaint dismissed.

S-2185, March 25, 1939, Docket 2313: (Hearing)

M. CORNFIELD & CO., ST. LOUIS, MO. v. THE R.B.WHITE CO., CRYSTAL CITY, TEXAS.

Violation charged: Failure to deliver 4 carloads of peppers in compliance with contract terms.
Principal point involved: When buyer's agent had knowledge of size and quality of peppers being packed and loaded the seller not liable for loss.
Order: Complaint dismissed.

Outline of Facts

Complainant alleged that on or about December 9 to December 13, 1935, through his field man, he bought from respondent 4 carloads of U.S. No. 1 California Wonder Peppers at $2.50 per crate f.o.b. Texas shipping point; that prior to arrival at destination complainant resold the peppers to purchasers in Chicago, Illinois and Kansas City, Mo., but the purchasers rejected the shipments because of failure to comply with contract terms; that thereafter complainant made other disposition of them, resulting in a loss to him of $3066.09, for the recovery of which this action was instituted.

Respondent contended that the peppers were sold according to description on the official loading point inspection certificates and that examination of the peppers by complainant's field man at or about the time of loading and his familiarity with the size of peppers produced in the territory made applicable the rule of caveat emptor.

Complainant's field man testified that he placed the order for U.S. No. 1 California Wonder peppers, with the exception of a few crates marked "Choice" and "that nothing was ever said between Mr. Dutt of (respondent company) and myself about the size***."

Federal-State of Texas inspection certificates issued December 9, 11, 12 and 13 showed that the "Choice" peppers met requirements of U.S. Grade No. 2 and that the other peppers met the requirements of U.S. Grade No. 1, 2½ inch minimum.

Rulings included in Decision

1. The principal question was whether the contract provided for the purchase and sale of U.S. Grade No. 1 peppers or for U.S. No. 1, 2¼ inch minimum peppers. The U.S. Standards for grade U.S. No. 1 sweet peppers provide in part that unless otherwise specified, the minimum size of peppers of short varieties (which includes California Wonder peppers) shall be 2½ inches in length and 2½ inches in diameter. The peppers were invoiced by respondent as U.S. Grade No. 1 with no minimum size specification. The evidence seemed clearly to establish that the sale of the four carloads of peppers by respondent to complainant, except for the few crates of "Choice" peppers, was made as grade U.S. No. 1, with no reference to minimum size.

2. The evidence showed clearly that complainant's field man was in and out of the packing plant frequently, practically every day, during the time the peppers were being loaded. He was at the grading table, talked with the inspector and employees of the respondent and had full opportunity to know and actually knew the size and quality of the peppers. The complaint was therefore dismissed because of the buyer's knowledge of the size and quality of the peppers.

3. The record showed that while the shipments were in transit complainant resold 3 of them to dealers in Chicago through a broker whose confirmations of sale were for U.S. No. 1 "Fancy"; that upon arrival the purchasers refused acceptance because the peppers were not in compliance with contract terms; that complainant attempted to make resale in Chicago and Kansas City in order to realize full returns on his investment, but, failing in this, the 3 carloads were diverted to New York City where resales resulted in alleged loss of $2992.14, the difference between the total price for which the peppers were sold to the Chicago purchasers and the net proceeds received from resale in New York City. Of course, the resale price on the description "Fancy" could not be a basis for determination of damages.

S-2186, March 25, 1939, Dockets 2367 and 2742: (Hearing)

DOCKET 2367, THOMAS-MORRIS PRODUCE CO., INC., SAN BENITO, TEXAS. v. S. LANDOW FRUIT & PRODUCE CO., INC., NEW HAVEN, CONN. and DOCKET 2742, S. LANDOW FRUIT & PRODUCE CO., INC. v. THOMAS-MORRIS PRODUCE CO., INC.

Violation charged: Unjustified rejection of two carloads of tomatoes by S. Landow Fruit & Produce Co.; failure of Thomas-Morris Produce Co., Inc., to deliver 7 carloads of tomatoes in compliance with contract.

Principal points involved: Inspectors finding that straight pack method of packing was employed, implied that since tomatoes were of irregular size they failed to meet grade U.S. No. 1 Straight Pack; U.S. Standard Pack met by U.S. Extra Row Pack, U.S. Bridge Pack, U.S. Double Wrap Pack or U.S. Straight Pack.

Order: Both complaints dismissed.

Outline of Facts

Thomas-Morris Produce Co., Inc. alleged that on or about June 17, 1936, it sold to S. Landow Fruit & Produce Co., Inc. two carloads of U.S. No. 1 tomatoes at $1.55 per lug f.o.b. Texas shipping points. Upon arrival at New Haven, Connecticut, Landow rejected the tomatoes for the alleged reason that they were not in suitable shipping condition at time of shipment and included such irregular sizes as prevented them from grading U.S. No. 1, Straight Pack, as specified in the contract. Thomas-Morris made resale at an alleged loss of $961.24, for which an award was asked.

Brokers memoranda of sale specified f.o.b. sales of U.S. No. 1 tomatoes, straight pack, Patriotic brand. Certificates of Federal-State inspections issued at Texas loading point on June 16, the date of shipment, showed the tomatoes then graded U.S. No. 1, without reference to pack.

S. Landow Fruit & Produce Co., Inc. complained that during the period May 27 to 30, 1935 they purchased from Thomas-Morris Produce Co., Inc. 7 carloads of Patriotic brand of U.S. No. 1 tomatoes, standard pack, at $1.10 per lug for all but one carload, which was sold at $1.05 per lug, f.o.b. shipping point; that Thomas-Morris failed to deliver in compliance with contract; and that it accepted these shipments under protest and was entitled to recover damages in the sum of $2,854.25.

Rulings included in Decision

1. Under the headings of grade and size the inspector of the first two cars mentioned above stated that the straight pack method of packing was found to have been employed. The conclusion necessarily reached, therefore, was that since the tomatoes were of irregular size, they failed to meet the requirements of U.S. No. 1 Straight Pack, as specified in the Broker's Standard Memorandum of Sale. This conclusion was supported by the testimony of the Federal Inspector at destination, who testified that he inspected the shipments at that point and found that the lugs contained tomatoes which were irregular in size and were loosely packed. This fact would necessarily bar a grade of U.S. No. 1 Straight Pack. S. Landow Fruit & Produce Co., Inc. was therefore warranted in rejecting these shipments and the complaint against that company was dismissed.

2. The countercomplaint and testimony given in support thereof indicated quite conclusively that the Landow Company understood "U.S. No. 1 Standard Pack" to mean U.S. No. 1 Straight Pack. Since the United States Standard Packs for fresh tomatoes provide only for U.S. Extra Row Pack, U.S. Bridge Pack, U.S. Double Wrap Pack and U.S. Straight Pack, the contract would have been complied with if any of these four packs had been supplied. Further more, it appeared obvious that the shipper was warranted in concluding that the Landow Company wanted U.S. No. 1 grade tomatoes of fairly uniform size which were to be placed in the lugs in accordance with one or more of the standard packs. The certificates of Federal-State inspection made at shipping point, which were included in the record, showed that all seven of the shipments upon which the countercomplaint was based graded U.S. No. 1, but that at least five of them failed to meet the requirements for one or more of the U.S. Standard packs because the tomatoes were not sufficiently uniform in size. They therefore failed to meet contract specifications as they were apparently understood by the shipper. Regardless of what the contracting parties may have had in mind with respect to grade and pack, the Landow Company failed to submit satisfactory proof in support of its claim that it was damaged in any certain sum, or in fact that it was damaged at all, because of failure of the tomatoes to meet contract specifications. The countercomplaint against Thomas-Morris Produce Co., Inc. was therefore dismissed.

S-2204, May 5, 1939, Docket 3101: (S.P.)

TRI-STATE SALES AGENCY, PITTSBURGH, PA. v. J. T. HARDEN, BREWTON, ALABAMA.

Violation charged: Failure to pay brokerage fee earned through sale of a carload of potatoes.
Principal point involved: Dismissal on ground complainant failed prove shipper subject to provisions of act.
Order: Complaint dismissed.

Outline of Facts

On or about May 21, 1937, respondent employed complainant as his broker to negotiate the sale of a carload of potatoes to be shipped from Alabama. Complainant secured from a purchaser in Pittsburgh, Pa., a written order for a carload of U.S. No. 2 Sound Triumph potatoes at $1.15 per bag delivered Pittsburgh, Pa. Respondent failed to make shipment at the time designated in the broker's standard confirmation of sale, and complainant asked for an award of $15 as the reasonable value of services rendered.

Respondent in his answer alleged that he was not a "dealer" as defined in the act, but a farmer, and that he did not "contract or offer to ship any potatoes except those grown by him," and that, "due to an act of God," he was unable to ship the potatoes.

Ruling included in Decision

Respondent having denied that he is, or was, a dealer as defined in section 2, paragraph 6, of the act, or subject to the act because the potatoes he contracted to ship were "of his own raising," the burden of proof was shifted to complainant. Complainant submitted no evidence and therefore failed to meet the burden of proof and establish his case. It was therefore concluded that respondent, as grower of the potatoes in question, was not subject to the provisions of the act and was not a dealer as therein defined. The complaint was dismissed.